(33)

No. 90-1947-CSX
Status: GRANTED

Title: John K. Yee, et al., Petitioners
v.
City of Escondido, California

Docketed:
June 21, 1991

Court: Court of Appeal of California,
Fourth Appellate District

See also:
90-1824

Counsel for petitioner: Jagiello,Robert J.

Counsel for respondent: Lincoln,Donald R., Phillips,Carter G.

4/30: Ext. granted, to 6/23, by O'Connor, J. (CITED); Supreme Court of CA denied rev. 1/24/91.

Entry	Date	Note	Proceedings and Orders
1	Apr 10 1991	G	Application (A90-766) to extend the time to file a petition for a writ of certiorari from April 24, 1991 to June 23, 1991, submitted to Justice O'Connor.
2	Apr 11 1991		Application (A90-766) granted by Justice O'Connor extending the time to file until May 24, 1991.
3	Apr 29 1991	G	Application (A90-766) to extend further the time to file a petition for a writ of certiorari from May 24, 1991 to June 23, 1991, submitted to Justice O'Connor.
4	Apr 29 1991		Response to application (A90-766) filed by City of Escondido in opposition to further extension of time.
5	Apr 30 1991		Application (A90-766) granted by Justice O'Connor extending the time to file until June 23, 1991.
6	Jun 21 1991	G	Petition for writ of certiorari filed.
7	Jul 8 1991		Waiver of right of respondents Del Dios Mobile Home Estates, et al to respond filed.
10	Jul 18 1991		Brief amicus curiae of Pacific Legal Foundation filed.
11	Jul 18 1991		Brief of respondent City of Escondido, CA in opposition filed.
9	Jul 19 1991		Brief amicus curiae of City of San Jose filed.
8	Jul 24 1991		DISTRIBUTED. September 30, 1991
13	Oct 7 1991		REDISTRIBUTED. October 11, 1991
14	Oct 15 1991		Petition GRANTED. limited to Questions 1 and 2 presented by the petition.
			**********
15	Nov 12 1991	D	Motion of petitioners to consolidate this case with No. 90-1824, Palomar Mobilehome Park Association v. City of San Marcos filed.
16	Nov 12 1991		Record filed.
		*	Original record Court of Appeal of California, Fourth Appellate District (3 Boxes)
20	Nov 15 1991		Record filed.
		*	Certified record Superior Court of California, County ofSan Diego
18	Nov 18 1991		Motion of petitioners to consolidate this case with No. 90-1824, Palomar Mobilehome Park Association v. City of San Marcos DENIED.
19	Nov 20 1991		SET FOR ARGUMENT WEDNESDAY, JANUARY 22, 1992. (1ST CASE)
26	Nov 25 1991		Brief amicus curiae of California Mobile Home Parkowners

3pp

Entry	Date	Note	Proceedings and Orders
			filed.
29	Nov 26 1991		Brief amicus curiae of Manufactured Housing Educational Trust of Santa Clara County filed.
33	Nov 26 1991		Brief amicus curiae of Western Mobilehome Association filed.
21	Nov 27 1991		Brief amicus curiae of Manufactured Housing Assn. in New Jersey filed.
22	Nov 27 1991		Brief amicus curiae of Arizona Mobile Housing Assn., Inc. filed.
24	Nov 27 1991		Brief amicus curiae of Apartment Association of Greater Los Angeles filed.
25	Nov 27 1991		Brief amicus curiae of Pacific Legal Foundation filed.
27	Nov 27 1991		Joint appendix filed.
30	Nov 27 1991		Brief amici curiae of California Association of Realtors, et al. filed.
32	Nov 27 1991		Brief amici curiae of Rent Stabilization Assn. of New York City, Inc., et al. filed.
34	Nov 27 1991		Brief amicus curiae of Manufactured Housing Educational Trusts of Los Angeles filed.
36	Nov 27 1991		Brief amicus curiae of Florida Manufactured Housing Association, Inc. filed.
38	Nov 27 1991		Brief of petitioners John K. Yee, et al. filed.
39	Nov 28 1991		Record filed.
		*	Certified proceedings Superior Court of San Diego County, California (4 BOXES)
23	Nov 29 1991		Brief amicus curiae of Action in Santa Monica filed.
31	Nov 29 1991		Brief amicus curiae of Institute of Real Estate Management of Natl.Assn.of Realtors filed.
35	Nov 29 1991		Brief amici curiae of Washington Legal Foundation, et al. filed.
28	Dec 5 1991		CIRCULATED.
40	Dec 28 1991	X	Brief amicus curiae of New Jersey Dept. of Public Advocate filed.
49	Dec 30 1991		Order extending time to file brief of respondent on the merits until January 3, 1992.
45	Dec 31 1991	X	Brief amici curiae of National Trust for Historic Preservation in the U.S., et al. filed.
42	Jan 2 1992	X	Brief amici curiae of International City/County Management Assn., et al. filed.
43	Jan 2 1992	X	Brief amici curiae of City of San Jose, et al. filed.
44	Jan 2 1992	X	Brief amici curiae of Golden State Mobilhome Owners League, et al. filed.
47	Jan 2 1992		Record filed.
		*	Lodging by amicus curiae City of San Jose, California - City Ordinance No. 23914, adopted Sept. 10, 1991.(1copy)
50	Jan 2 1992	X	Brief amicus curiae of Escondido Mobilhome Owners' Positive Action Committee filed.
51	Jan 2 1992	X	Brief amicus curiae of American Association of Retired Persons filed.
41	Jan 3 1992	X	Brief amici curiae of City of Santa Monica, et al. filed.
46	Jan 3 1992	X	Brief of respondent City of Escondido, CA filed.
52	Jan 14 1992	X	Reply brief of petitioners John K. Yee, et al. filed.

No. 90-1947-CSX

Entry	Date	Note	Proceedings and Orders
53	Jan 22 1992		Argued

90-1947

No. _____

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN K. YEE AND IRENE S. YEE, H.N. AND FRANCES C. BERGER FOUNDATION, MOUNTAIN SHADOWS MOBILE HOME ESTATES, RICHARD C. KUEBLER, dba MOONGLOW MOBILE HOME PARK, CASA DE AMIGOS MOBILE HOME ESTATE, VISTA VERDE, LTD., IMPERIAL ESCONDIDO MOBILE ESTATES and MILDRED D. TACEY,

Petitioners,

vs.

THE CITY OF ESCONDIDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?

2. Is there a violation of substantive due process under local rent controls for mobilehome parks, which do not provide for vacancy decontrol, where the effect of the ordinance is to merely transfer the value of the right to occupy at a reduced rate from the parkowner to the departing tenant, and in no way protects the present tenants in their

tenancy from rent increases or decreases, and increases the cost to incoming tenants by the amount of the "premium" paid by said tenant to the departing tenant for the right to occupy at a reduced rate?

3. Since the federal right or claim does not ripen until the state has denied just compensation, did the federal claim even exist at the time the state courts purported to dispose of it?

4. Does a federal "as applied" taking claim arise at the time of the passage of the rent control ordinance or sale of the coach for a premium, such that new federal claims, arising after completion of state court proceedings, are now ripe for decision by the federal district court?

LIST OF PARTIES

The caption of the case contains the names of all parties who are Petitioners in this Petition for Writ of Certiorari. The decision of the Court of Appeal for the Fourth Appellate District, reprinted in Appendix A to this Petition, lists all parties to the proceedings in the state appellate court in the caption of that decision.

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C. ORDER of the Superior Court of the State of California for the County of San Diego Granting Motion to Strike Portions of Plaintiffs' Complaint; Sustaining Demurrer to Plaintiffs' Complaint Without Leave to Amend; and Dismissing Entire Action as to all Parties, filed March 30, 1989.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN K. YEE AND IRENE S. YEE, H.N. AND FRANCES C. BERGER FOUNDATION, MOUNTAIN SHADOWS MOBILE HOME ESTATES, RICHARD C. KUEBLER dba MOONGLOW MOBILE HOME PARK, CASA DE AMIGOS MOBILE HOME ESTATE, VISTA VERDE, LTD., IMPERIAL ESCONDIDO MOBILE ESTATES, and MILDRED D. TACEY,

Petitioners

vs.

THE CITY OF ESCONDIDO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Petitioners, John K. Yee and Irene S. Yee, H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler dba Moonglow Mobile Home Park, Casa de Amigos Mobile

Home Estate, Vista Verde, Ltd., Imperial Escondido Mobile Estates, and Mildred D. Tacey pray that a writ of certiorari issue to review the decision and judgment of the Fourth Appellate District, Division One, Court of Appeals for the State of California, filed on October 31, 1990 in Yee v. City of Escondido, 4th Civ. App. D010307, consolidated on appeal with eleven other cases at the request of the Court, eight of those cases' plaintiffs are Petitioners herein.

OPINIONS BELOW

The decision of the Fourth Appellate District Court of Appeal for the State of California, Division One, whose judgment is herein sought to be reviewed, was issued on October 31, 1991, and became final on the issuance of the remittitur on February 4, 1991. The opinion is reported at 224 Cal.App.3d 1349, 274 Cal.Rptr. 551,

and a copy of the Court's decision is located at **Appendix A** to this Petition. A copy of the Order of the California Supreme Court denying the Petition for Review in this case appears in **Appendix B** to this Petition.

The California Supreme Court has also denied a Petition for Review in the case of Palomar Mobilehome Park Association v. City of Escondido, 4th Civ. No. D011484, an unpublished opinion of the State Court of Appeals of California for the Fourth Appellate District, which has the same effect and holding as the opinion in this case, and for which a Petition for Review is currently pending in this Court, Docket No. 90-1824.

The Superior Court of the State of California in and for the County of San Diego entered judgment dismissing plaintiff Yees' complaint on demurrer for

failure to state a cause of action on March 30, 1989, and a copy of the court's order appears in **Appendix C** to this petition. All of the other petitioners here were also dismissed on demurrer in the Superior Court for failure to state a cause of action.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The decision and judgment of the Fourth Appellate District, Division One, Court of Appeal for the State of California, was filed on October 31, 1991. That judgment and decision finally affirmed the orders of the Superior Court of San Diego County, California, entered individually in each of Petitioners' cases, dismissing plaintiffs' complaints on demurrer of the City of Escondido for failure to state a cause of action.

A timely consolidated petition for the discretionary review of the Supreme Court of the State of California was denied by Order on January 24, 1991.

On April 11, 1991, Ms. Justice Sandra Day O'Connor entered an order extending the time for the filing of this petition to and including May 24, 1991. On April 30, 1991, Ms. Justice Sandra Day O'Connor entered an order entered an order further extending the time for the filing of this petition to and including June 23, 1991.

CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

Fifth Amendment

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall . . . be deprived of. . . property, without due process of law; nor shall private property be

taken for public use, without just compensation.

California Constitution

The California Constitution, Article I, Sec. 19, provides:

> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

Escondido Ordinance

The Escondido Municipal Code, Article V, §§ 29-101 through 29-108, codifies Proposition K, a voter initiative

establishing mobilehome park rent controls for mobilehome parks located within the City's jurisdiction. Section 29-103 provides, in pertinent part:

> Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986.. . .No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board [the mobilehome park rental review board of the City of Escondido].

Sections 29-107 and 29-108 of the Ordinance provide that a tenant may refuse to pay any rent in excess of the maximum rent permitted by Article V, and that any such "excess" rent is illegal, non-payment of which provides a defense to eviction

and will subject the "person who demands, accepts or retains any payment of rent in violation of this article" to treble damages plus attorneys' fees and costs, as well as a misdemeanor prosecution punishable by fine and/or confinement.

Section 29-106 of the City's Ordinance provides that "a tenancy which is not subject to the provisions of the mobilehome residency law shall not be terminated nor shall its renewal be refused, except for one or more of the following reasons:" and then sets forth those same protection from eviction for other than "good cause" as are set forth in the California Mobilehome Residency laws.

California Statutes

The California Mobilehome Residency Law (Cal. Civ. Code §§ 798 et seq.), specifically §§ 798.55, 798.56 & 798.74,

protect tenants from eviction from a mobilehome park and require the approval of a purchaser of a mobilehome that will remain in the park if the purchaser has the financial ability to pay the rent and does not have a prior tenancy history indicating he or she will not comply with the rules and regulations of the park. (Pertinent portions of Cal. Civ. Code §§ 798 et seq. are set forth in **Appendix D** to this Petition.)

STATEMENT OF CASE

This Petition seeks review of the California Fourth Appellate Court's opinion and judgment denying an unconstitutional taking of property results from vacancy control in mobilehome park rent control ordinances, in direct contravention to the federal law as established in both the Ninth and Third Circuits under Hall v. City of Santa

Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) and Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990).

PROCEDURAL BACKGROUND

AND HOW THE FEDERAL QUESTIONS AROSE

The Complaints

Plaintiff Yees filed suit in the San Diego Superior Court on December 1, 1988, challenging the City of Escondido's mobilehome rent control ordinance as applied to plaintiffs on the basis that the inability of the plaintiff parkowners to raise rents on a space at the time a mobilehome is sold in-place effects a taking of property which is specifically condemned in Hall v. City of Santa Barbara, supra, by allowing the outgoing tenant to sell along with his or her trailer the right to occupy the rent-

controlled space, for which a quantifiable premium is received by the outgoing tenant representing the value of the right to occupy and for which the landlord parkowner receives nothing.

Plaintiff Yees' complaint sought redress for the violation of its civil rights under 42 U.S.C. §§ 1983 et seq due to the alleged taking in violation of the Fifth and Fourteenth amendments to the U.S. Constitution, as well as just compensation under the California State Constitution, Article 1, Section 19. Plaintiffs sought declaratory and injunctive relief against further enforcement of the ordinance, and attorneys' fees under 42 U.S.C. § 1988 and Cal. Civ. Proc. § 1036. (Complaint, S.D.S.Ct. Case No. N 42268).

Petitioners H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home

Estates, Richard C. Kuebler dba Moonglow Mobile Home Park, Casa de Amigos Mobile Home Estate, Vista Verde, Ltd., Imperial Escondido Mobile Estates, and Mildred D. Tacey filed complaints subsequent to the Yees which were identical in all respects, except that they alleged a taking had occurred for which compensation was due under Article 1, Section 19 of the California Constitution without reference to the federal constitution.

The Demurrers

The City filed a Demurrer and Motion to Strike, arguing that Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, (1988) was not binding on the California state courts, and that precedence established by facial attacks to rent control per se provided authority under California law for the dismissal of plaintiffs'

complaint. (City's Memorandum of Points & Authorities in Support of Demurrer, Case No. N 42268, filed on January 3, 1989).

Plaintiffs' Opposition

Plaintiffs opposed the demurrer, arguing that as in Hall v. City of Santa Barbara, supra, this was an as applied attack and Hall constituted the entire published case law on point to this litigation and was, thus, controlling, and that the City's ordinance, superimposed upon the preexisting California Mobilehome Residency law, effected a taking in the same way as did the ordinance found unconstitutional in Hall.

Plaintiffs argued that by allowing the departing tenant to sell the right to occupy the rent-controlled space, a taking occurred under both the California Constitution and the Fifth and Fourteenth amendments to the U.S. Constitution, for

which redress under 42 U.S.C. § 1983 et seq. was available.

Plaintiffs further explained that they were not asserting that all rent control ordinances, or even all mobilehome rent control ordinances were unconstitutional, but that their complaint was specifically addressed to the "vacancy control" provisions of the Escondido ordinance because the inability of the landlord to raise rental rates at the time of sale or transfer for consideration resulted in the outgoing tenants' ability to sell the possessory property right, out of which sale, the landlord property owner receives nothing.

Plaintiffs further argued that the inability to raise rents at the time of sale does not substantially advance the legitimate governmental interest in preserving low cost housing opportunities

because the incoming tenant pays more due to the premium received by the outgoing tenant than would be paid if the landlord were allowed to raise rents to market levels, the ordinance effects a taking under Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987). (Points and Authorities in Opposition to Demurrer, Case No. 42268, filed January 18, 1989).

The oppositions in the other Petitioners' cases took the same form, with Petitioners' arguing that an uncompensated taking occurred due to vacancy control which was prohibited under both the California Constitution and the Fifth and Fourteenth amendments to the U.S. Constitution.

The Ruling on Demurrer

The Superior Court ruled for the defendant City granting both the Motion to

Strike and the demurrers without leave to amend and dismissing the case on its own motion. The Court's Order was entered by signature of the Judge on March 30, 1989. Notice of Signing of Order was served to plaintiffs on April 4, 1989, and filed on April 5, 1989.

The Appeal

Plaintiffs timely appealed their dismissals to the Fourth Appellate District Court of Appeals for the State of California, Division One. On appeal, plaintiffs argued that the effect of the City of Escondido's mobilehome park rent control ordinance with vacancy control was an unconstitutional taking under both the California Constitution and the Fifth and Fourteenth amendments to the U.S. Constitution and that this taking due to vacancy control was recognized and condemned as a physical occupation taking

of property requiring compensation both in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) and in the more recent case of Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990)[1].

Plaintiffs argued that the federal cases constituted the controlling law as it was the only law on point to this litigation and noted that the Central District had followed Hall, supra, in Azul Pacifico v. City of Los Angeles, (C.D.Cal. Case No. CV 87-2287-LEW) in rendering judgment for plaintiff and invalidating

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[1] The Appellate Court was notified of the Pinewood decision in Appellants' Supplemental Brief filed on May 21, 1990 (pursuant to the Court's order granting Appellant's Motion to file Supplemental brief) in the consolidated case No. D010769, which was subsequently consolidated with the Yee case No. D010307.

the Los Angeles mobilehome park rent ordinance because it did not provide for vacancy decontrol and thus effected an unconstitutional taking of property without compensation (that decision is now published as Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. (C.D.Cal. 1990)).

Appellant further argued that the ordinance violates the due process clause of the fourteenth amendment because it does not substantially advance legitimate state interests, while effecting a physical taking of property, and was, thus, an irrational exercise of the City's police powers. (Appellant's Opening Brief, filed October 2, 1989).

The City argued that the Hall case is against the weight of authority, rendered by a Ninth Circuit panel that was "confused" and "lost in their own

rhetoric". (Respondent's Brief, filed on or about November 14, 1989, pp. 9 - 10). The City further argued that subsequent cases decided by the U.S. Supreme Court undermined the Hall, supra, rationale. (Respondent's Brief, pp. 11 - 12).

The City argued that Hall v. City of Santa Barbara, supra, was not binding on the state courts, and that Azul Pacifico, supra, was merely a decision in which the Court was bound to follow Hall, supra. The City argued, as well, that this issue had been previously decided by the Fourth Appellate Court in Oceanside Mobilehome Park Owners Assn. v. City of Oceanside, 157 Cal.App.3d 887, 204 Cal.Rptr. 239 (1984). (Respondent's Brief, pp. 14-16)

Appellant argued in Reply that, contrary to Respondent's assertions, there was no case law contrary to Hall, supra, Pinewood, supra, and Azul Pacifico, supra,

as no other case addressed the issues in this litigation. Appellant explained the cases cited by the City were all distinguished from the present litigation in material ways which compelled the following of the federal cases which had specifically found vacancy control provisions of mobilehome park rent control ordinances effected a taking requiring compensation.

Appellant further argued whether an ordinance is rational is a factual matter, improperly disposed of at the pleading stage. (Appellant's Reply Brief, filed December 1, 1989)

THE STATE COURT OF APPEALS DECISION, INCONSISTENT WITH RULING FEDERAL APPELLATE DECISIONS, THAT THE FORCED TRANSFER OF THE "PREMIUM VALUE," WHICH PREMIUM REPRESENTS THE RIGHT TO OCCUPY THE SPACE AT A REDUCED RENT, FROM LANDLORD TO TENANT, DOES NOT CONSTITUTE A TAKING IS ERROR.

The Ruling on Appeal

The Fourth Appellate court issued its ruling on October 31, 1990, affirming the trial court's dismissal.

The Court below, after stating "No one can dispute that Escondido's Rent Control Ordinance, like the Ordinance in Oceanside, effects a transfer of value from landlords to tenants." (Opinion, Appendix A, pp. 13 - 14), rejected the Hall reasoning (Opinion, Appendix A, pp. 15 - 28), as well as the Court of Appeal's decision in Pinewood Estates (Opinion,

Appendix A, p. 19) for two fundamental reasons:

(1) The Court's generalized understanding of economics (Opinion, Appendix A, pp. 8 - 9), and

(2) its alleged prior holding in the case of Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside, 157 Cal.App.3d 887, 204 Cal.Rptr. 239 (1984).

Huffman, J. dissenting, correctly noted:

> The difficulty, however, with this position [that the Fourth Appellate District had taken a contrary position to that advanced in Hall in the Oceanside case] is that although the Oceanside opinion discussed a multitude of issues having to do with the Oceanside Ordinance dealing with rent control in mobilehome parks, it did not

> really address the issue now before us.

(Opinion, Appendix A, Dissent, p. 35).

The Court below also sought to distinguish the holding in Pinewood Estates, supra, by criticizing the failure of the Third Circuit to discuss or cite F.C.C. v. Florida Power, 480 U.S. 245 (1987). (Opinion, Appendix A, p. 19, ftn. 10).

In ruling on appellant's claim, the Fourth Appellate Court used the standard applicable to facial attacks to rent controls per se, rather than the standard proper for an as applied attack to a regulation that effects a physical occupation taking of property. In ruling against appellant, the Court said:

> The critical question is whether such transfer can be justified by a rational governmental purpose, i.e.

are the controlled rents fair and reasonable. In Oceanside we were forced to deal with this important question and concluded the ordinance there was rationally based. Here, plaintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a "fair" rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no "taking". The fact that used mobilehomes in Escondido are selling for more than they have in the past is irrelevant.

(Opinion, Appendix A, p. 14).

In its determination that plaintiffs had not stated a cognizable taking claim, the Fourth Appellate Court was adjudicating plaintiffs' claims under the Fifth (and Fourteenth) amendments to the U.S. Constitution as well as under the California Constitution. (Opinion, Appendix A, p. 6). However, in so ruling, the California Court specifically declined to follow the federal cases of Hall, supra, and Pinewood Estates, supra.

The Federal Cases

Plaintiff Yees filed an action in the U.S. District Court for the Southern District of California on February 14, 1989 (S.D.Cal. No. 890234 B (CM)). In that Complaint, plaintiff Yees sought damages for the taking due to vacancy control under 42 U.S.C. §§ 1983 et seq., alleging a taking in violation of the Fifth and

Fourteenth amendments to the U.S. Constitution.

In ¶ 8 of the federal Complaint, plaintiffs specifically alleged that suit had been filed in the state court to comply with the requirement that plaintiffs exhaust state remedies under Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985), and that suit had been dismissed on February 10, 1989.

The California courts were well-aware of the federal Complaint filed by plaintiff Yees, and made reference to the Yees returning to federal court in footnote 1 of the published Yee decision. (See Appendix A, p. 4).

On June 23, 1989, pursuant to Motion to Abstain by the City, the Southern District Court ordered the case stayed "pending the exhaustion of all state

remedies, including appeal". (A copy of the court's order staying the case appears in **Appendix E** to this petition.)

On January 31, 1991, after the order of the California Supreme Court issued denying the Petition for Review in this case, Plaintiffs filed a Motion for an Order Lifting the Stay in the federal case.

The court initially ordered the Stay lifted (on March 22, 1991) saying:

Plaintiff's Motion for Order Lifting Stay is granted. When the California Supreme Court denied Plaintiffs' petition for review of the Court of Appeal's decision in Yee v. City of Escondido, 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990), Plaintiffs were allegedly denied just compensation for the alleged Fifth Amendment "taking." The court finds

that Plaintiffs have thus exhausted their state court remedies as required by Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985)."

(Appendix F, p. 2).

The City then filed a Motion to Reconsider and a Motion to Dismiss on the grounds that plaintiffs' federal case was barred by the doctrine of res judicata and the preclusive effect of the state court lawsuit on the federal suit. The Court reconsidered and determined, by Order entered on June 12, 1991, that plaintiffs had fully litigated their federal claims in the state courts and dismissed the federal case saying, inter alia:

> The federal district courts are courts of original, and not appellate, jurisdiction. Thus, the proper forum for review of the judgment in Yee v.

City of Escondido is the United States Supreme Court, and not the United States District Court. . . .

> The Court is aware that the interplay between Williamson - which requires exhaustion of state court procedures for a federal taking claim to ripen - and the doctrine of res judicata have placed Plaintiffs in a curious, and frustrating position. By satisfying the exhaustion requirement and litigating the federal claim in state court, Plaintiffs are now barred from litigating the federal claim in federal court. However, the court is unaware of any applicable exception to res judicata which would allow this court to relitigate the federal constitutional issue."

(See Appendix G to this Petition.)

Petitioners H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler dba Moonglow Mobile Home Park, Casa de Amigos Mobile Home Estate, Vista Verde, Ltd., and Mildred D. Tacey filed federal Complaints on February 1, 1991. All of these Petitioners' federal complaints were dismissed on the same res judicata grounds, even though their state complaints had not alleged any federal claims.

Plaintiffs contend that if this Court does not grant review in this case, the federal courts should be ordered to take jurisdiction of the federal cases.

The Federal Claim Did Not Even Exist At the Time the State Court Purported To Dispose of it

(a) Elements of a Cause of Action For Fifth Amendment Taking Claim.

The court in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985) set forth the elements of a taking claim under the Fifth amendment as follows:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.. . .If the government has provided an adequate process for taking compensation and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.. . .Similarly, if a State provides an adequate procedure

for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. . . .Thus, the state's action is not "complete" in the sense of causing the constitutional injury "unless or until the state fails to provide an adequate post deprivation remedy for the property loss".

Williamson Planning Comm., supra, 473 U.S. at 194-195, (internal citations omitted).

There are, thus, at least two elements to a taking claim under the Fifth amendment: (1) a taking, and (2) a failure of post deprivation remedies to provide just compensation.

The second element for a taking under federal law is that the State by its conduct establish that adequate

compensation will not be provided. That element can only be satisfied by utilizing state procedures, completing them without success, and then, and only then, is there a federal right under the Fifth Amendment. It is at that time of completion that plaintiffs' federal claims arise.

Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), cert. den. __ U.S. __, 110 S.Ct. 1317 (1990) speaks to exactly the same point:

> So long as the state provides "an adequate process for obtaining compensation," no constitutional violation can occur until the state denies just compensation.

Sinaloa, supra, 882 F.2d at 1402, (emphasis added).

Since the state courts of California have failed to provide just compensation,

the federal claim ripens only after state court action is complete and thus, the purported ruling on the federal claim is an act without any effect since the federal claim did not exist until and after the state court proceedings on the matter had come to an end.

(b) This is a Continuing Wrong, Each New Sale of a Coach Creates a New Cause of Action, and the Federal Claim is Now Ripe for Adjudication.

It is indisputable that a cause of action arises on each sale of a coach. Since a cause of action under Hall does not exist until there has been the monetization of the right to occupy the space at a reduced rent by the departing tenant (i.e., the tenant receives a premium due to rent control), unless and until the premium has been received, no cause of action may be maintained.

Two examples illustrate the point:

(a) Suppose an ordinance is passed, and, thereafter, for a period of five years a coach is not sold. No cause of action exists under Hall, there has been no prohibited transfer of the premium value of the coach, and the cause of action will arise, if at all, at the time of the sale of the coach.

(b) Suppose after a statute is passed, real property values decline for a period of five years, and the departing tenant receives no premium value for the coach upon sale. Again, under Hall, there would be no cause of action upon which a lawsuit can be maintained.

The application of defendant's ordinance to plaintiffs' private property effects a taking without just compensation. It is a continuing wrong. The question of when a claim accrues is

determined by federal law. McCune v. City of Grand Rapids, 842 F.2d 903, 905 (6th Cir. 1988); Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984); Storey v. U.S., 629 F.Supp. 1174, 1177 (ND Miss. 1986).

The continuing wrong applies in federal court:

> Where a continuous chain of events or course of conduct is involved the cause of action accrues at the time of the final act in a series of event or course of conduct.

Barbaccia v. County of Santa Clara, 451 F.Supp. 260, 266 (ND Cal. 1978).

The continuing wrong doctrine also applies to civil rights violations and taking claims which are made in federal court. Front Royal and Warren Industrial Parks v. Front Royal, 708 F.Supp. 1477 (WD Va. 1989). The Front Royal court rules that a city's refusal to connect sewers to

a property was a continuing wrong and that the statute of limitations did not begin running on the date that sewers were scheduled to be installed.

> This court has previously considered the statute of limitations defense offered by defendants and has found that, since there was a continuing wrong, plaintiffs' action [for inverse condemnation and civil rights violation] are not time barred.

(708 F.Supp. at 1487).

Similarly in Lockary v. Kayfetz, 587 F.Supp. 631, 635 (N.D. Cal. 1984), the district court applied the continuing wrong doctrine to a taking claim on the grounds that the implementation and enforcement of a water moratorium was a continuing wrong.[2]

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[2] The California Supreme Court applied a continuing wrong doctrine to an action brought by neighboring homeowners

The source of an entire claim needs to be analyzed to determine if a wrong is continuing:

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for inverse condemnation and nuisance against a public entity operating an airport in Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 705 P.2d 866 (1985). The Baker court discussed the difference between permanent and continuing nuisances:

> On the one hand, permanent nuisances are of a type where 'by one act a permanent injury is done, [and] damages are assessed once for all.' . . . Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence.
>
> On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. 39 Cal.3d 862 at 868-869.

The Baker court went on to discuss the importance of plaintiff's election to treat the nuisance as permanent or continuing:

> In case of doubt as to the permanency of the injury the plaintiff may elect whether to treat a particular nuisance as permanent or continuing. The importance of the plaintiff's election has long been recognized. 39 Cal.3d at 870.

We are not now called upon to decide whether in a situation like this (recovery of inverse condemnation damages after the government flooded land) a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him - for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim . . . is not a single event; it is continuous and as there

> is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized.

United States v. Dickinson, 331 U.S. 745, 749 (1946).

A variation on the continuing wrong doctrine is found in Gordon v. City of Warren, 579 F.2d 386 (7th Cir. 1978). In Gordon the court ruled that the statute of limitations for damages under 42 U.S.C. § 1983 did not even begin to run until the ordinance at issue was declared invalid. The district court had applied a three-year statute of limitations running from the date of enactment and rejected application of the continuing wrong doctrine. The Court of Appeal reversed setting the date of the accrual of the

right to seek damages as the date on which the court ruled the ordinance invalid.

Here, the request to declare the ordinance invalid is made in the same action as the damage claim. Application of a rule of accrual which would run from the date of declaration of invalidity is a variant on the continuing wrong doctrine. The plaintiffs meet either characterization of the rule. The right of action claimed by the plaintiffs to recover damages accrued within the time permitted in the statute of limitations.

Another manner in which to determine if a wrong is a continuing wrong is to look at how a remedy can be fashioned. If the plaintiffs could sue for all damages and recover them in one action, the wrong would not be continuing. (See Korgel v. U.S., 619 F.2d 16 (8th Cir. 1980)).

It has been held that the enactment of an ordinance alone does not give rise to a cause of action. It is the resulting damage under the ordinance that gives rise to a claim. (Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 293-297 (1981); Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d (1988)).

Recovery is only available to plaintiffs as to coaches which have sold. Mobilehome coaches which have not sold have not resulted in a transfer of the unconstitutionally taken rights as the party owning the coach has only benefitted from the constitutional portions of the City's rent control scheme.

It is only when the mobilehome coach owner sells that the authority of the unconstitutional portions of the rent control scheme are invoked. It is only

when the mobilehome coach sells that damage arises. It is an essential corollary that a separate damage arises each time a coach is sold. Since the plaintiffs cannot recover in one action for the damages from coaches that have not yet sold, plaintiffs would require successive actions for damages. The need for successive actions is a hallmark of a continuing wrong.

Where the damages resulting from an act are continuing or recurring so that they cannot at present be ascertained or estimated to bring in a single action, then separate and successive actions may be brought to recover damages as they occur. In those cases, the action accrues for purposes of the limitation period from the date of each injury and the plaintiff is not barred for a recovery

for such damages as have accrued within this statutory period before the filing of the action.

Piccolini v. Simon's Wrecking, 686 F.Supp. 1063, 1076-1077 (MD Pa. 1988).

The Petition for Review to the California Supreme Court

A Petition for (the discretionary) Review to the California Supreme Court was timely filed by plaintiffs/ appellants/ petitioners. Petitioners argued that the California Supreme Court should take the case for review as the decision rendered in the Fourth Appellate District, Division One, was directly in contravention to federal case law established by the Hall, Pinewood Estates, and Azul Pacifico cases (cited supra). However, the California Supreme Court entered an order denying the Petition on January 24, 1991.

WHY THIS WRIT SHOULD BE GRANTED

Special and important reasons exist for the granting of this Petition for Review as identified in Supreme Court Rule 10. The important questions of federal law presented here have never been ruled upon by this Court.

As specifically enunciated in Supreme Court Rule 10 (b), review may be granted:

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of a U.S. court of appeals.

In Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), the Ninth Circuit Court found the Santa Barbara mobilehome rent control ordinance, identical in legal effect to the ordinance in Escondido, effected an

unconstitutional taking without compensation.

In Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990), the Third Circuit found that vacancy control provisions of the Barnegat mobilehome park rent control ordinance in conjunction with state law (similar to the California Mobilehome Residency laws) effected a physical occupation taking without compensation in violation of the Fifth and Fourteenth amendments to the U.S. Constitution.

The state courts here specifically denied the viability of the Hall, supra, and Pinewood, supra, cases, and, concluding that they were not bound to follow them, determined that plaintiffs could not state a cause of action under either the California Constitution or the federal Constitution.

Petitioners contend the California state courts erred in determining federal rights under the Fifth and Fourteenth amendments in contravention of the entire published federal case law on point. In essence, by refusing to accept the precedents established in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990), and further explained in Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. (C.D.Cal. 1990), while determining that plaintiff petitioners had failed to state a cognizable taking claim, the California Fourth Appellate court, Division One, has effectively overruled the decisions of two unanimous federal appeals courts.

Such flagrant disregard for federal law cannot be tolerated. This Supreme Court should grant this Petition for Review to protect this and similar plaintiffs from having their constitutional rights extinguished by state courts who fail to follow federal court precedence on issues of federal law.

IN CONCLUSION

Petitioners request this court to grant their petition for review or in the alternative to remand to the lower court with instructions to limit its decision to state constitutional issues or to follow federal law when ruling on federal constitutional issues. A third alternative is for this Court to order the federal courts to take jurisdiction of petitioners' claims.

Respectfully submitted,

LAW OFFICES OF JAGIELLO & PECH

By _____
ROBERT J. JAGIELLO
Attorneys for Petitioners
John K. Yee and Irene S. Yee, H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler dba Moonglow Mobile Home Park, Casa de Amigos Mobile Home Estate, Vista Verde, Ltd., and Mildred D. Tacey

APPENDIX A

APPENDIX A

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN K. YEE, et al.,	)	
	)	
Plaintiffs and Appellants,	)	D010307
	)	
v.	)	Super.
	)	Ct. No.
CITY OF ESCONDIDO, a Municipal Corporation,	)	N42268
	)	
	)	
Defendant and Respondent.	)	
	)	

[And eleven other cases.]*

FILED October 31, 1990

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* H.N and Frances C. Berger Foundation v. City of Escondido, D010796; Mountain Shadows Mobile HOme Estates v. City of Escondido, D010805; Richard C. Kuebler dba Moonglow Mobilehome Park v. City of Escondido, D010942; Casa De Amigos Mobile Home Estates v. City of Escondido, D010972; Vista Verde Limited v. City of Escondido, D011011; Escondido Mobileparks West v. City of Escondido, D011027; Robert Dolley, et al. v. City of Escondido, D011028; Glen Charles De Jong, et al. v. City of Escondido, D011029; Del Dios Mobile Home Estates v. City of Escondido, D011030; Imperial Escondido Mobile Estates v. City of Escondido, D011046; and Mildred D. Tacey v. City of Escondido, D011115.

APPEAL from a judgment of the Superior Court of San Diego County, Don Martinson, Judge. Affirmed.

Robert J. Jagiello, Debra K. Butler and Jagiello & Pech for Plaintiffs and Appellants.

David R. Chapman and Jeffrey R. Epp, City Attorneys, Donald R. Lincoln, Linda B. Reich and Endeman, Lincoln, Turek & Heater for Defendant and Respondent.

Plaintiffs in these consolidated cases are all owners of mobilehome parks in Escondido. They ask us to revisit an issue of federal constitutional law we first considered several years ago in Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside (1984) 157 Cal.App.3d 887. In that case we rejected an argument made by an association of park owners that rent control ordinance constituted a compensable "taking" because tenants were

able to realize a premium on the sale of their mobilehomes in a rent controlled park compared with the price similar homes sold for in a non-rent control setting. Plaintiffs urge we reconsider our views relying on a more recent opinion from the Ninth Circuit Court of Appeals, which, based on an admittedly lengthier analysis, accepted such an argument. (See Hall v. City of Santa Barbara 99th Cir. 1986) 833 F.2d 1270.)

While federal circuit court precedent on issues of federal law is certainly entitled to substantial deference, it is not binding. (Rohr Aircraft Corp. v. County of San Diego (1959) 51 Cal.2d 759, 764; see 9 Witkin, Cal. Procedure (3rd ed. 1985) Appeal, § 780, p. 751.) We have reviewed the issue anew in light of Hall. Putting aside the practical effect of our

decision[1], we find Hall's reasoning unpersuasive and reaffirm the conclusion we reached in Oceanside.

FACTUAL AND PROCEDURAL BACKGROUND

In June 1988, voters in the City of Escondido passed an initiative measure which enacted a mobilehome rent control ordinance. Generally, the ordinance provided for a rollback of rents for mobilehome spaces to those existing on January 1, 1986. Park owners can seek adjustments in this base rent by filing an

[1] The Yees have filed a parallel action in federal court which was stayed by the district court judge pending exhaustion of all state court remedies. Assuming the California Supreme Court does not grant review, the Yees will then be able to return to federal court where the district court judge may feel compelled to follow Hall and grant the Yees the relief they seek. On the other hand, as we later explain (post, p. _), we think at least one United States Supreme Court decision which post-dates Hall demonstrates that Hall's analysis constitutes an interpretive misstep.

application with the City's Mobilehome Park Rental Review Board.[2]

Escondido's rent control ordinance does not exist in a vacuum. The relationship between landlords and tenants in mobilehome parks is extensively regulated by the California Mobilehome Residency Law. (Civ. Code, § 798 et seq.) Under its terms, a tenancy may not be terminated except for several specified reasons constituting good cause. (§ 798.56). In addition, a park owner is compelled to accept as a new tenant a person who purchases a mobilehome from an existing tenant unless the new tenant does not have the financial ability to pay rent or, based on past tenancies, has

[2] The members of the Escondido City Council serve as the Mobilehome Park Rental Review Board.

demonstrated he or she will not comply with the park rules and regulations. (§ 798.74.)

It is the combined effect of the Escondido rent control ordinance and the California Mobilehome Residence Law which plaintiffs contend amounts to a compensable "taking" within the meaning of the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution. They note that state law compels the park owner -- except in limited circumstances -- to accept the purchaser of an existing tenant's mobilehome as a new tenant. As a result, plaintiffs argue, the price of used motorhomes in Escondido has increased dramatically since passage of the rent control ordinance due entirely to the fact that existing tenants are able to monetize the value to mobilehome owners living in a

rent controlled jurisdiction. According to plaintiffs, Escondido's rent control ordinance constitutes a "taking" because it transfers this monetary interest from park owners -- who would normally capture the value through increased rents -- to tenants.

Plaintiffs never sought an adjustment in the base rent to be charged in the mobilehome parks they own under the terms of the Escondido ordinance. Instead, they filed this lawsuit challenging the constitutionality of the ordinance on its face and seeking compensation for the interest which they allege has been "taken". In each case, the court sustained the City's demurrer to the complaint without leave to amend and dismissed the action.

DISCUSSION

A

Mobilehomes and mobilehome park spaces are what economists refer to as complementary goods. Because they are used together, there is a direct and necessarily inverse relationship between the prices for complementary goods. For example, a decrease in the price of popcorn will cause an increase in the demand for popcorn poppers. Assuming a constant supply, this in turn will result in an increase in the price of popcorn poppers. The "complementary good" effect is basic to a free market economy. (See, e.g., Reynolds, Microeconomics; Analysis and Policy (5th ed. 1985) p. 41; McConnell, Economics: Principles, Problems, and Policies (10th ed. 1987) p. 55.)

It is thus inevitable that where government acts to reduce (or at least limited increases in) the rental prices charged for mobilehome spaces, the price of mobilehomes will increase. This is particularly true where, as in California, other statutes generally compel a park owner to accept the purchaser of an existing tenant's mobilehome as a new tenant. This assures that the complementary good effect will be substantially limited to those mobilehomes currently occupying rent-controlled spaces.

Recognizing that "the function of government may often be to tamper with free markets, correcting their failures and aiding their victims" (Fisher v. Berkeley (1986) 475 U.S. 260, 264), decisions of the United States and California Supreme Courts have established

that local governments may, consistent with the police power, adopt rent control ordinances where imperfections in the unregulated market for rental housing allow landlords to charge excessive rents. (See, e.g., Pennell v. San Jose (1988) 485 U.S. 1, 11-12.) The U.S. Supreme Court has repeatedly reaffirmed that rent control ordinances are not per se takings for the purposes of the Fifth Amendment's requirement of due compensation. (Id. at p. 12, fn. 6; FCC v. Florida Power Corp. (1987) 480 U.S. 245, 252; Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 440.) The California Supreme Court has explained that rent control ordinances "are within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property.

However, if it is apparent from the face of the provisions that their effect will necessarily be to lower rents more than could reasonably be considered to be required for the measure's stated purpose, they are unconstitutionally confiscatory." (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 165; accord Permian Basin Area Rate Cases (1968) 390 U.S. 747, 769-770.)

Where the price charged for a good or service is excessively high due to monopoly or other unfair conditions, it necessarily follows that the price for complementary goods and services will be artificially low. Where a government regulation purports to reduce the excessive and unfair price to a reasonable level, the mere fact that the price for complementary goods and services rises as a result does not transmute an otherwise

reasonable price regulation into a compensable "taking".[3]

This was the rationale underlying our succinct conclusions in the Oceanside case. In describing the plaintiffs' contentions, we quoted from an amicus brief:

> "'[W]here rents are reduced more than required for the purposes of the police power, an artificially reduced rent ceiling results, which constitutes a valuable interest to the existing tenant which may be sold to a buyer of the mobilehome under the requirements of State law. The combined effect of the Mobilehome Residency Law (Civ. Code, § 798 et seq.) and the Ordinance assures this result.' Thus, amicus argues, a park owner is bound to accept a selling tenant's assignment of an existing lease [citation], nd a selling tenant with a favorable rent-controlled lease may be able to sell the onsite mobilehome for a higher price than can be obtained for the identical mobilehome situated in an unregulated park of identical quality where higher rents are being charged." (157 Cal.App.3d at pp. 906-907.)

We then answered the contention:

> "The amicus' initial premise is flawed. The ordinance is structured to establish a fair base rent which reflects general market conditions and incorporates relevant pricing factors. Rents will not be 'reduced more than required for the purposes of the police powers.': (Id. at p. 907.)

No one can dispute that Escondido's rent control ordinance, like the ordinance

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[3] One might argue that monopolistic effects have caused the price of used motorhomes to be artificially high and as a result, such prices should be regulated as well. Even if this were true, however, it is an issue between mobilehome buyers and sellers. It does not suggest that governmental regulation of excessive rents has "taken" anything from landlords.

in Oceanside, effects a transfer of value from landlords to tenants. The critical question is whether such a transfer can be justified by a rational governmental purpose, i.e., are the controlled rents fair and reasonable. In Oceanside we were forced to deal with this important question and concluded the ordinance there was rationally based. Here, plaintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a "fair" rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no "taking". The fact that used mobilehomes in Escondido are selling for more than they have in the past is irrelevant.

B

Instead of addressing the fundamental question, plaintiffs place principal emphasis on the Ninth Circuit's Hall opinion. (833 F.2d 1270.) Hall relies extensively on the U.S. Supreme Court's decision in Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. 419. Loretto dealt with a New York law which required residential landlords to permit cable television companies to attach cables to their buildings. The court created an exception to the traditional multifactor balancing approach applicable to most governmental regulations which are alleged to constitute takings. The Court explained that where the governmental action "is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the

action achieves an important public benefit or has only minimal economic impact on the owner." (Id. at pp. 434-435.) Characterizing this holding as "very narrow" (Id. at p. 441). the Court emphasized that "[s]o long as [government] regulations do not require the landlord to suffer the physical occupation of a portion of building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." (Id. at p. 440).

Implicitly conceding that the Santa Barbara mobilehome rent control ordinance would not constitute a taking under a traditional multifactor inquiry, Hall attempts to argue that the effect of the ordinance is to grant tenants the right to permanently occupy the landlord's property at a reduced rent. The opinion thus

suggests that the allegations of plaintiffs' complaint fit within the narrow Loretto exception and constitute a per se taking.[4] Hall, however, does not discuss or even cite our prior decision in Oceanside. It dismisses the contrary implications of other substantial precedent by noting that "[i]n none of the cited cases have the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value,

[4] Other than Loretto, Hall places primary reliance on Justice Rehnquist's solitary dissent to the Court's dismissal in Fresh Pond Shopping Center, Inv. v. Callahan (1983) 464 U.S. 875 for want of a substantial federal question. Hall explains, "We do interpret the Fresh Pond dismissal as repudiating everything said by Justice Rehnquist in his dissent." (833 F.2d at p. 1276, fn. 14.) There being no opinion of the court in the case of a dismissal, we have some difficulty understanding on what basis the Hall panel can distinguish those portions of dissent which can be relied upon from those which cannot.

that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." (833 F.2d at p. 1278.)

Hall is an unfortunate corollary to the danger Justice Blackmun foresaw when, in dissenting in Loretto, he lamented "the prospect of distinguishing the inevitable flow of certiorari petitions attempting to shoehorn insubstantial takings into [Loretto's] 'set formula.'" (458 U.S. at p. 451.)[5] If mobilehome park tenants in Santa Barbara or Escondido possess any rights to "permanently occupy" the landlord's property, those rights derive

[5] Even commentators sympathetic to Hall's result have implicitly criticized its analysis, warning against "stretching doctrine to conclude that government has 'physically occupied' property . . ." (Hirsch & Hirsch, Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol (1988) 35 UCLA L.Rev. 399, 466.)

not from a rent control ordinance but from the state Mobilehome Residency Law which limits the circumstances under which a landlord may terminate a tenancy, imposing a "good cause" standard. No case we are aware of has remotely suggested that such a regulation of the landlord-tenant relationship constitutes a compensable taking within the meaning of Loretto.

Moreover, Hall failed to explain why the existing tenant's ability to "monetize" the future rent control savings and recapture it from later tenants when the mobilehome is sold is somehow critical to the takings analysis.[6] (See Manheim, Tenant Eviction Protection and the Takings Clause (1989) 1989 Wis. L.Rev. 925, 969,

[6] Pinewood Estates v. Barnegat Tp. Leveling Bd. (3rd Cir. 1990) 898 F.2d 347, which follows Hall, suffers from a similar defect.

fn. 237.)[7] If an owner's property has been taken by the government, it should be of no constitutional consequence to whom the property has been given. Compare, for instance, a residential rent control ordinance which does not allow rent increases simply because the tenant vacates the rental unit. Similar

[7] Commenting on Hall in light of the history of Supreme Court takings jurisprudence, Professor Manheim observes that Ninth Circuit's approach, "finding a taking of a quantifiable 'monetized' interest in a mobile home's placement value, is essentially that of Justice Holmes' repudiated model" in Pennsylvania coal co. v. Mahon (1922) 260 U.S. 393. (Manheim, op. cit. supra, at p. 968.) "Indeed," concludes Manheim citing Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 130, "the Court has squarely rejected Justice Holmes' model of dividing single parcels into discrete estates, favoring instead Justice Brandeis' approach of looking at a law's impact on overall property value, . . . Under the modern unitary approach, the net economic impact of the state [mobilehome residency] law, even when combined with local rent control, would be insufficient to cause a regulatory taking." (Id. at pp. 967-968, fns. omitted.)

ordinances have repeatedly withstood challenges alleging facial unconstitutionality. (See, e.g., Fisher v. City of Berkeley (1984) 73 Cal.3d 644, app. dism. 471 U.S. 1124; Hutton Park Gardens v. Town Council (N.J. 1975) 350 A.2d 1.) In such a case, the economic benefit of the ordinance is spread among all succeeding tenants. In this case, of course, plaintiffs and the Hall court would assert that the benefit of the ordinance is limited to those mobilehome tenants renting spaces at the time the ordinance is enacted. In both cases, however, the value "taken" from the property owner is conceptually identical.[8]

[8] It may be that what really underlies the Hall result is the court's doubt that mobilehome rent control rationally furthers a legitimate governmental purpose. (See 833 F.2d at pp. 1280-1281.) This same concern has been voiced by a set of sympathetic

Beyond its "monetization" argument, Hall merely identifies the necessary relationship between the prices charged for complementary goods and services -- in this case the mobilehome and the mobilehome rental space -- and uses it as facile but irrelevant justification for the conclusion that a taking has occurred. Put more simply, if the rents charged by park owners before rent control were

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commentators who question whether rent control does anything to alleviate the shortage of available mobilehomes or lessen the total economic burden on mobilehome park tenants. (Hirsch & Hirsch, supra, 35 UCLA L.Rev. at pp. 461-463.) While portions of the Supreme Court's takings jurisprudence have their origins in notions of substantive due process, Hall's resurrection of a Lochner-type analysis (see Lochner v. New York (1905) 198 U.S. 45) has been criticized as inconsistent with the modern Court's deferential view of the nexus between legitimate governmental purposes and chosen legislative means. (Manheim, op. cit. supra, 1989 Wis. L.Rev. at p. 938, fn. 86, 948-950; Hall, supra, 833 F.2d at p. 1284. (Schroeder, J. dis. from den. of rhg. en banc).)

excessive, the market price for used mobilehomes were artificially and perhaps unfairly low. (But see ante, fn. _.) When government acts to restore fair rents by imposing rent control, the fact that the price of used mobilehomes rises has not unreasonably "taken" anything from the landlord, but alone caused a "permanent physical occupation" of the landlord's property.[9]

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[9] Hall and commentators of a like view assume that the uncontrolled rent for a mobilehome space is its "fair" rental value. (See Hall, supra, 833 F.2d at p. 1276 (Tenants pay "only a fraction of what it is worth in rent . . ."); Hirsch & Hirsch, op. cit. supra, 35 UCLA L.Rev. at p. 427 ("[W]e assume that a pad's fair rental value is the market rental of a similar pad in a jurisdiction without rent control.").) Such analysis begs the ultimate question for it fails to acknowledge that rent controls may be justified if quasi-monopolistic market conditions have allowed park owners to charge higher rents than would be possible if the market were perfectly competitive. (See, e.g., Cotati Alliance for Better Housing v. City of Cotati (1983) 148 Cal.App.3d 280, 287.) Hirsch and Hirsch take issue with such a theory, arguing

Moreover, if Loretto were not clear enough that a rent control ordinance of the type considered in Hall does not

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that mobilehome rent control ordinance generally penalize landlords "irrespective of the rental rates charged to tenants, the amount of frequency of rent increase, os the profits reaped by particular landlords." (Hirsch & Hirsch, supra, at p. 463.) Such an argument is presumably meant to suggest that not all landlords take advantage of the quasi-monopoly power they may possess.

Here, however, plaintiffs have limited themselves to a facial attack on the ordinance's constitutionality, refusing to seek individualized upward adjustments in the allowable rent as provided for in the ordinance. (See ante, p. _.) As the California Supreme Court has explained, "[W]hether rental regulations are fair or confiscatory depends ultimately on the result reached. [Citation.) That determination, or course, can only be made by analyzing a challenge to the regulation as applied . . . [W]e will [only] declare a regulation invalid on its face 'when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties.' [Citations.]" (Fisher v. City of Berkeley, supra, 37 Cal.3d 644, 679, app. dism. 471 U.S. 1124) Certainly plaintiffs cannot now be heard to complain that the ordinance is indiscriminate in its approach.

constitute a per se taking, that conclusion was punctuated in F.C.C. v. Florida Power Co., supra, 480 U.S. 245, decided six month after Hall. Florida Power involved a federal rent control statute limiting the amount utilities could charge cable television companies for the right to use power poles to string television cable. The Court emphasized that the "element of required acquiescence is at the heart of the concept of occupation." (Id. at p. 252, emphasis added.) The power company contended "it is a taking under Loretto for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79." (Ibid.) Rejecting this contention, the Court responded, "[I]t is the invitation, not the rent, that makes the difference. The line which separates these cases from Loretto is the unambiguous distinction

between a commercial lessee and an interloper with a government license."[10] (Id. at pp. 252-253; accord Eamiello v. Liberty Mobile Home Sales (Conn. 1988) 546 A.2d 805, 818.)

The owners of mobilehome parks in Santa Barbara or Escondido are not required to acquiesce in the occupation of some or all of their property by third persons designated by the government. Nothing requires them to rent their property to mobilehome owners. If they choose to do so, however, the terms on which they may do so are regulated by state statute and local ordinance. Read in light of Florida Power, Loretto in no way suggests that the Escondido ordinance

[10] The Third Circuit in Pinewood Estates v. Barnegat Tp. Leveling Bd., supra, 898 F.2d 347 adopted Hall's reasoning but failed to discuss or even cite Florida Power.

authorizes a permanent physical occupation of the landlord's property and therefore constitutes a per se taking.[11]

C

Whether rent control is a good idea is politically debatable. (See generally, e.g., Salins, Reflections on Rent Control and the Theory of Efficient Regulation (1988) 54 Brooklyn L.Rev. 775.) The

[11] It is true the Court in Florida Power reserved the issue of how Loretto might apply "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." (480 U.S. at p. 252, fn. 6.) Here, however, even the California Mobilehome Residency Law does not require mobilehome park owners to "refrain from terminating" mobilehome space leases. It simply regulates the economic relationship between the landlord and tenant, requiring that the landlord terminate the space rental only for good cause. As Loretto itself was careful to emphasize, such reasonable regulation of the landlord-tenant relationship has never been viewed as a per se taking. (458 U.S. at p. 440; see also Florida Power, supra, 480 U.S. at p. 252.)

footnotes of the Hall opinion suggest an interest in contributing to that debate. (See, e.g., 833 F.2d at p. 1281, fn. 26.) While we find the topic an interesting one, it is not a discussion we are prepared to join. As we read the opinions of the U.S. Supreme Court and lower federal and states courts, the decision whether to use rent control as a took to correct imperfections in the market system is a political issue for legislative bodies and not a question of constitutional law for the courts. Here, finding no persuasive reasoning to the contrary, we simply reaffirm what we assumed six years ago in Oceanside was accepted constitutional principle.[12]

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[12] We are sensitive to the concerns raised by the dissent that this is a pleading case. We have accepted the allegations of plaintiffs' complaints as true. Our difference with the federal courts in Hall and Pinewood Estates is not based on our respective determinations of

DISPOSITION

Judgment affirmed.

CERTIFIED FOR PUBLICATION

\S\ Wiener
WIENER, Acting P.J.

I CONCUR:

\S\ Work
WORK, J.

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what constitutes a disputed factual issue requiring the taking of evidence. The circuit courts concluded that if the Hall and Pinewood plaintiffs could prove their allegations, they would establish a cognizable takings claim. Assuming proof of the same factual predicates, we would find no taking. The issue is purely a question of law.

In addition, the question of whether the Escondido ordinance is constitutional as applied is simply not before us. Plaintiffs specifically limited their argument to a claim of facial unconstitutionality. Our opinion should not be read to preclude these or other plaintiffs from challenging the ordinance as applied if the appropriate prerequisites (e.g., seeking adjustments from the Rental Review Board) are satisfied.

HUFFMAN, J., dissenting:

This appeal is from an order sustaining a demurrer without leave to amend. As such, we are dealing only with the various pleadings and our inquiry is limited to whether, under the facts pleaded in the complaints, as supplemented by any matter that may properly be judicially noticed, the pleadings state facts sufficient to constitute causes of action for a governmental taking. (Banerian v. O'Malley (1974) 42 Cal.App.3d 604, 611.) The court should not uphold the sustaining of a demurrer without leave to amend if there is a reasonable possibility that a defect in the complaints can be cured by amendment. (Minsky v. City of Los Angeles (1974) 11 Cal.3d 113, 118.)

The majority ignores the procedural posture of these cases and decides a

complex issue without the benefit of evidence. It does this by characterizing the consolidated lawsuit as one challenging the constitutionality of the Escondido ordinance on its face. (Maj. opn., pp. 4-5.) Yet the majority also accurately notes the plaintiffs are alleging it is the combined effect of the application of the ordinance and the state statute which amounts to a compensable "taking" within the Fifth and Fourteenth Amendments to the United States Constitution, and article I, section 19 of the California Constitution. (Maj. opn., p.4.)

As the majority recognizes, facial challenges are different than challenges to the application of otherwise valid statutes and ordinances. (Maj. opn., pp. 13-14, fn. 9.) Although a court may declare a regulation invalid on its face

"when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties . . ." (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 165), the fairness of confiscatory nature of a facially valid regulation will ultimately depend on analyzing a challenge to the regulation as applied. (See Fisher v. City of Berkeley (1984) 37 Cal.3d 644, 679.) Such challenge generally involves the facts of each particularized case, not just the statute or ordinance in a vacuum.

While the California Supreme Court has set forth a test for a constitutional facial attack of a rent control regulation, it has found it "premature and problematic" to do so for attacks against specific applications of such regulation. (Fisher v. City of Berkeley, supra, 37 Cal.3d at p. 681, fn. 35.) In Fisher,

footnote 35, our Supreme Court carefully noted the requirement mentioned in Birkenfeld that rent controls must provide landlords a "just and reasonable return on their property" was made in reference to a facial challenge to a regulation and concerned the legitimate exercise of local police power in enacting the regulation and not as a constitutional standard for the application of the regulation. (Ibid., citing Birkenfeld v. City of Berkeley, supra, 17 Cal.3d at p. 165.)

The majority appears to use this standard, however, to foreclose plaintiffs from individually challenging the operation of the Escondido ordinance in conjunction with the state statute. (Maj. opn., pp. 6, 13-14, fn. 9.) Admittedly, the complaints as pleaded contain mixed allegations of facial challenges and challenges to the ordinance as applied.

However, because there is a reasonable possibility the plaintiffs could plead causes of action challenging the application of the ordinance combined with the statute as was done in the two United States Circuit Courts of Appeals decision, Hall v. City of Santa Barbara (9th Cir. 1986) 833 F.2d 1270 and Pinewood Estates v. Barnegat Tp. Leveling Bd. (3d Cir. 1990) 898 F.2d 347, upon which plaintiffs rely, I would allow the plaintiffs to amend their complaints.

As the majority makes clear, we are not bound to follow decisions of lower federal courts even on federal questions. However, when two circuits of the United States Courts of Appeals reach the same result to allow a plaintiff to proceed to attempt to prove a physical taking by application of an ordinance, which is inartfully alleged here, I believe this

court should give great deference to those decisions.

The majority criticizes the Ninth Circuit decision in Hall for its failure to cite our earlier decision in Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside (1984) 157 Cal.App.3d 887 and affirms our continued reliance on ". . . what we assumed six years ago in Oceanside was accepted constitutional principle." (Maj. opn., p. 16.) The difficulty, however, with this position is that although the Oceanside opinion discussed a multitude of issues having to do with the Oceanside ordinance dealing with rent control of mobilehome parks, it did not really address the issue now before us. The only discussion that remotely resembles the issue in this case is entirely contained in a few paragraphs which the majority recites as succinctly

concluding the Oceanside ordinance was fairly structured not to reduce rents more than required for the purposes of the police power. (Maj. opn., pp. 7-8.) Respectfully, these paragraphs do not in any fashion analyze the issue presented here. Consequently, there is nothing in our Oceanside opinion which should be cited on the issue and we should perhaps forgive the Ninth Circuit Court of Appeals for its failure to do so.

The majority's principal criticism of Hall and Pinewood is that each opinion relies heavily on the United States Supreme Court decision of Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419. Additionally, Pinewood is criticized for its failure to discuss the later case of FCC v. Florida Power Corp. (1987) 480 U.S. 245. I submit the

majority's criticism of these two circuit court opinions is unwarranted.

Loretto makes clear physical occupation of private property by government action constitutes a taking to the extent of the occupation, regardless of public benefit or economic benefit to the owner. (Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. at pp. 434-435.) Following Loretto, the courts in Hall and Pinewood allowed the plaintiffs to get past the dismissal stage and attempt to prove a physical taking within the meaning of Loretto. Each held a physical taking was conceptually possible under the theory raised by the pleadings of those plaintiffs.

Moreover, as the majority concedes in a footnote after its discussion of how Florida Power conclusively "punctuates" that the type of rent control ordinances

considered in Hall does not constitute a taking per se, the Supreme Court in Florida Power did not even consider the issue of the cable television/utility rates there under its holding in Loretto. (Maj. opn., p. 15, fn. 11.) Thus the precise issue before this court was not reached. (See FCC v. Florida Power Corp., supra, 480 U.S. 245, 251-252.) The majority's reliance on Florida Power to undercut Loretto and in turn the premise of both Pinewood and Hall is therefore inapposite.

The majority's further attempt to brush this fact aside is not persuasive. As the court in Hall noted, the fact a tenant's right to occupy a space is not truly perpetual does not defeat a claim for taking. (Hall v. City of Santa Barbara, supra, 833 F.2d at p. 1277.) If a property owner is required to allow

tenancy in perpetuity at compensation below market rates unless the space rental is terminated for good cause defined by the ordinance and state statute combined in application, Loretto 8indicates a taking has been shown. I would thus follow the Courts of Appeals in Hall and Pinewood in allowing the plaintiffs to proceed with their cases on this issue.

The majority opinion, although scholarly and well written, draws upon the author's own knowledge and that of text writers and law review commentators for the truth of economic principles. Popcorn and popcorn poppers may be complementary goods, however, analogy to their economic relationship does not assist us in resolving the complex questions of real property economics presented by these pleadings. Thus, I am uncomfortable with

attempting to resolve those issues at this time.

I strongly believe we should allow the parties to amend their complaints so they can put on their respective cases and we can review this important and difficult issue on a full record. I therefore dissent.

CERTIFIED FOR PUBLICATION

\S\ Huffman
HUFFMAN, J.

APPENDIX B

APPENDIX B

Fourth Appellate District, Division One,
Nos. D010307/D010769/D010805/D010942/
D010972/D011011/D011027/D011028/D011030/
D011046/D011115/

S018568

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

JOHN K. YEE, ET AL., Appellants

v.

CITY OF ESCONDIDO, Respondent

And Companion Case

FILED Jan. 24, 1991

Appellant's Petition for review DENIED.

Baxter, J. did not participate.
Lucas, C.J. and Panelli, J. are of the
opinion that petition should be granted.

\S\ LUCAS
Chief Justice

APPENDIX C

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

JOHN K. YEE AND IRENE S. YEE,	CASE NO. N42268
Plaintiffs,	ORDER GRANTING MOTION TO STRIKE PORTIONS OF PLAINTIFFS'
v.	COMPLAINT; SUSTAINING DEMURRER TO
CITY OF ESCONDIDO, a Municipal Corporation and DOES 1 through 10, inclusive,	PLAINTIFFS' COMPLAINT WITHOUT LEAVE TO AMEND; AND DISMISSING ENTIRE ACTION AS TO ALL PARTIES
Defendants.	DATE: Feb. 10, 1989 TIME: 9:00 a.m. DEPT: B

FILED March 30, 1989.

Defendant CITY OF ESCONDIDO'S Motion to Strike portions of Plaintiffs' Complaint and Demurrer to Plaintiffs' Complaint were heard on February 10, 1989,

before the Honorable Don Martinson in Department B of the San Diego Superior Court, North County Branch. Donald R. Lincoln of Endeman, Lincoln, Turek & Heater appeared as counsel for Defendant CITY OF ESCONDIDO. Robert J. Jagiello appeared as counsel for Plaintiffs JOHN and IRENE YEE.

After hearing, the matter was submitted to the Court for a ruling. The court, having read and considered the supporting nd opposing points and authorities and having heard and considered the arguments of counsel, and good cause appearing;

IT IS ORDERED that the following be stricken from the Plaintiffs' Complaint:

1. From page 2, lines 28 to page 3, line 5, the following sentence: "The rent control law has had the effect of depriving the Plaintiffs of all use and

occupancy of its real property and granting to the tenants of mobile homes presently in the Park, as well as the successor in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiffs."

2. From page 3, line 21, the following words: "of permanent physical occupation of a fixed reduced rent."

IT IS FURTHER ORDERED that the Demurrers to both the First and Second Causes of Action are sustained without leave to amend on the grounds that neither cause of action states facts sufficient to constitute a cause of action pursuant to C.C.P. Section 430.10(e).

IT IS FURTHER ORDERED that the above-entitled action be and it hereby is

dismissed as to all parties with prejudice.

DATED: Mar. 30, 1989

\S\Don Martinson
JUDGE OF THE SUPERIOR COURT

Approved as to form

\S\ Robert J. Jagiello
Robert J. Jagiello
Attorney for Plaintiffs
JOHN and IRENE YEE

APPENDIX D

APPENDIX D

CALIFORNIA MOBILEHOME RESIDENCY LAWS

(EXCERPTS)

ARTICLE 6. TERMINATION OF TENANCY

§ 798.55. Protection from actual or constructive eviction; termination or refusal to renew; reasons; notice; time

(a) The Legislature finds and declares, that because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afford by the provisions of this chapter.

(b) The management shall not terminate or refuse to renew a tenancy,

except for a reason specified in this article and upon the giving of written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, as defined in Section 18005.8 of the Health and Safety Code, each junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, and the registered owner of the mobilehome, if other than the homeowner, by United States mail within 10 days after notice to the homeowner addressed to the legal owner and junior lienholder, and the registered owner at their addresses, as set forth in the registration card specified in Section 18091.5 of the Health and Safety Code.

§ 798.56. Authorized reasons for termination

A tenancy shall be terminated by the management only for one or more of the following reasons:

(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency.

(b) Conduct by the homeowner or resident, upon the park premises, which constitutes a substantial annoyance to other homeowners or residents.

(c) Conviction of the homeowner or resident for prostitution or a felony controlled substance offense if the act resulting in the conviction was committed anywhere on the premises of the mobilehome

park, including, but not limited to, within the homeowner's mobilehome.

However, the tenancy may not be terminated for the reason specified in this subdivision if the person convicted of the offense has permanently vacated, and does not subsequently reoccupy, the mobilehome.

(d) Failure of the homeowner or resident to comply with a reasonable rule or regulation of the park which is part of the rental agreement or any amendment thereto.

No act or omission of the homeowner or resident shall constitute a failure to comply with a reasonable rule or regulation unless and until the management has given the homeowner written notice of the alleged rule or regulation violation and the homeowner or resident has failed to adhere to the rule or regulation within

seven days. However, if a homeowner has been given a written notice of an alleged violation of the same rule or regulation, on three or more occasions within a 12-month period after the homeowner or resident has violated that rule or regulation, no written notice shall be required for a subsequent violation of the same rule or regulation.

Nothing in this subdivision shall relieve the management from its obligation to demonstrate that a rule or regulation has in fact been violated.

(e)(1) Nonpayment of rent, utility charges, or reasonable incidental service charges; provided that the amount due has been unpaid for a period of at least five days from its due date, and provided, that the homeowner shall be given a three-day written notice subsequent to that five-day period to pay the amount due or to vacate

the tenancy. For purposes of this subdivision, the five-day period does not include the date the payment is due. The three-day written notice shall be given to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure. A copy of this notice shall be sent to the persons or entities specified in subdivision (b) of Section 798.55 within 10 days after notice is delivered to the homeowner. If the homeowner cures the default, the notice need not be sent. The notice may be given at the same time as the 60 days' notice required for termination of the tenancy.

(2) Payment by the homeowner prior to the expiration of the three-day notice period shall cure a default under this subdivision. In the event the homeowner does not pay prior to the expiration of the three-day notice period, the homeowner

shall remain liable for all payments due up until the time the tenancy is vacated.

(3) Payment by the legal owner, as defined in Section 18005.8 of the Health and Safety Code, any junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, or the registered owner, as defined in Section 18009.5 of the Health and Safety Code, if other than the homeowner, on behalf of the homeowner prior to the expiration of 30 calendar days following the mailing of the notice to the legal owner, each junior lienholder, and the registered owner provided in subdivision (b) of Section 798.55, shall cure a default under this subdivision with respect to that payment.

(4) Cure of a default of rent, utility charges, or reasonable incidental service charges by the legal owner, any junior lienholder, or the registered

owner, if other than the homeowner, as provided by this subdivision, may not be exercised more than twice during a 12-month period.

(5) If a homeowner has been given a three-day notice to pay the amount due or to vacate the tenancy on three or more occasions within tne preceding 12-month period, no written three-day notice shall be required in the case of a subsequent nonpayment of rent, utility charges, or reasonable incidental service charges.

In that event the management shall give written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, each junior lienholder, and the

registered owner of the mobilehome, if other than the homeowner, as specified in paragraph (b) of Section 798.55, by certified or registered mail return receipt requested within 10 days after notice is sent to the homeowner.

(f) Condemnation of the park.

(g) Change of use of the park or any portion thereof, provided:

(1) The management gives the homeowners at least 15 days' written notice that the management will be appearing before a local governmental board, commission, or body to request permits for a change of use of the mobilehome park.

(2) After all required permits requesting a change of use have been approved by the local governmental board, commission, or body, the management shall

give the homeowners six months' or more written notice of termination of tenancy.

If the change of use requires no local governmental permits, then notice shall be given 12 months or more prior to the management's determination that a change of use will occur. The management in the notice shall disclose and describe in detail the nature of the change of use.

(3) The management gives each proposed homeowner written notice thereof prior to the inception of his or her tenancy that the management is requesting a change of use before local governmental bodies or that a change of use requested has been granted.

(4) The notice requirements for termination of tenancy set forth in Section 798.56 and 798.57 shall be followed if the proposed change actually occurs.

(5) A notice of a proposed change of use given prior to January 1, 1980, which conforms to the requirements in effect at that time shall be valid. The requirements for a notice of a proposed change of use imposed by this subdivision shall be governed by the law in effect at the time the notice was given.

(h) The report required pursuant to subdivisions (b) and (i) of Section 65863.7 of the Government code shall be given to the homeowners or residents at the same time that notice is required pursuant to subdivision (g) of this notice.

§ 798.56a. Notice to management after receipt of notice of termination by legal owner and each junior lienholder; right to sell mobilehome within park

(a) Within 60 days following receipt, or not later than 65 days after the

mailing, of the notice of termination of tenancy for nonpayment, or rent or other charges, the legal owner and each junior lienholder shall notify the management in writing of at least one of the following:

(1) Its offer to sell the obligation secured by the mobilehome to the management for the amount specified in its written offer. In that event, the management shall have 15 days following receipt of the offer to accept or reject the offer in writing. If the offer is rejected, the person or entity shall have 10 days in which to exercise one of the other options contained in this section and shall notify management in writing of its choice.

(2) Its intention to foreclose on its security interest in the mobilehome.

(3) Its request that the management pursue the termination of tenancy against

the homeowner and its offer to reimburse management for the reasonable attorney's fees and court costs incurred by the management in that action.

(b) In the event that the legal owner or junior lienholder exercises any option described in paragraph (2) or (3) of subdivision (a), and has the right to sell the mobilehome within the park to a third party in accordance with this article, that person or entity shall have the right to keep the mobilehome on the site within the mobilehome park until it is resold as long as the person or entity performs all of the following acts:

(a)(A) Satisfies, within the time period specified in subdivision (a), all of the homeowner's responsibilities and liabilities owing to the management for the 90 days preceding the mailing of the notice of termination of tenancy and then

continue to satisfy them as they accrue from the date of the mailing of that notice until the date the mobilehome is resold.

(B) Performance under this paragraph does not cure the default of the homeowner.

(C) For purposes of this paragraph, the "homeowner's responsibilities and liabilities" means all rents, utilities, reasonable maintenance charges of the mobilehome and its premises, and reasonable maintenance of the mobilehome and its premises pursuant to existing park rules and regulations.

(2) Within the time period specified in subdivision (a), commences all repairs and necessary corrective actions so that the mobilehome complies with park rules and regulations in existence at the time the notice of termination of tenancy was

given as well as the health and safety standards specified in Sections 18550, 18552, and 18605 of the Health and Safety Code, and completes these repairs and corrective actions within 90 calendar days of that notice, or before the date the mobilehome is resold, whichever is earlier.

(3) Complies with the requirements of Article 7 (commencing with Section 798.70) as it relates to the transfer of a mobilehome to a third party.

(c) In the event the legal owner or junior lienholder does not respond to the notice provided by management by notifying management in writing of its election pursuant to subdivision (a), or does not satisfy the requirements of subdivision (b), that person or entity shall have no rights to sell the mobilehome within the park to a third party.

(d) In the event the homeowner files for bankruptcy, the periods set forth in this section are tolled until the mobilehome is released from bankruptcy.

(e) Notwithstanding any other provision of law, including, but not limited to, Section 18099.5 of the Health and Safety Code, in the event neither the legal owner nor a junior lienholder, if any, notifies the management of its decision pursuant to subdivision (a) within the period allowed, or performs as agreed within 30 days, the management may either remove the mobilehome from the premises and place it in storage or store it on its site. In this case, notwithstanding any other provision of law, the management shall have a warehouseman's lien in accordance with Section 7209 of the Commercial Code against the mobilehome for the costs of

dismantling and moving, if appropriate, as well as storage, which shall be superior to all other liens, except the lien provided for in Section 18116.1 of the Health and Safety Code, and may enforce the lien pursuant to Section 7210 of the commercial code.

(f) All written notices required by this section shall be sent to the other party by certified or registered mail with return receipt requested.

ARTICLE 7. TRANSFER OF MOBILEHOME OR MOBILEHOME PARK

§ 798.74. Prior approval of purchaser; grounds for withholding; financial information; notice of acceptance or rejection; interview; fee; credit or refund

(a) The management may require the right of prior approval of a purchaser of a mobilehome that will remain in the park

and that the selling homeowner or his or her agent gives notice of the sale to the management before the close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park. In determining whether the purchaser has the financial ability to pay the rent and charges of the park, the management shall not require the purchaser to submit copies of any personal income tax returns in order to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support.

Upon request of any prospective homeowner who proposes to purchase a mobilehome that will remain in the park, management shall inform that person of the information management will require in order to determine if the person will be acceptable as a homeowner in the park.

Within 15 business days of receiving all of the information requested from the prospective homeowner, the management shall notify the seller and the prospective homeowner, in writing, of either acceptance or rejection of the application, and the reason if rejected. During this 15-day period the prospective homeowner shall comply with the management's request, if any, for a personal interview. If the approval of a prospective homeowner is withheld for any reason other than those stated in this article, the management or owner may be

held liable for all damages proximately resulting therefrom.

(b) If the management collects a fee or charge from a prospective purchaser of a mobilehome in order to obtain a financial report or credit rating, the full amount of the fee or charge shall be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management shall refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee, or a portion thereof, to defray its administrative costs under this section.

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN K. YEE AND IRENE S. YEE,	)	CASE NO. 890234 B (CM)
Plaintiffs,	)	ORDER STAYING ACTION PENDING EXHAUSTION OF STATE COURT REMEDIES
v.	)	
CITY OF ESCONDIDO, a Municipal Corporation,	)	DATE: June 7, 1989 TIME: 1:30 p.m. CTRM: 2
Defendant.	)	

FILED June 27, 1989

Defendant City of Escondido's Motion to Dismiss Plaintiffs' Complaint was heard on June 7, 1989, before the Honorable Rudi M. Brewster, United States District Judge, in Courtroom 2 of the above-entitled Court. Donald R. Lincoln of Endeman,

Lincoln, Turek & Heater appeared as counsel for Defendant City of Escondido. Robert J. Jagiello appeared as counsel for Plaintiffs John and Irene Yee.

The Court, having read and considered all moving and responding papers, and having heard and considered the arguments of counsel, it appears and the Court finds that the Plaintiffs have failed to exhaust their State Court remedies prior to filing this action in Federal Court.

IT IS HEREBY ORDERED that this action is stayed pending Plaintiffs' complete exhaustion of all State Court remedies

including appeal.

Dated: Jun 23, 1989

\S\ Rudi M. Brewster
Judge of the District Court

Approved as to form

\S\ Robert J. Jagiello
Robert J. Jagiello

APPENDIX F

APPENDIX F

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN K. YEE and IRENE S. YEE,	) CIV. NO. 89-0234-B (CM)
Plaintiffs,	) ORDER LIFTING STAY
v.	)
CITY OF ESCONDIDO, a Municipal Corporation,	)
Defendant.	)

FILED March 25, 1991

On March 11, 1991, the above captioned matter came on regularly for hearing before the Honorable Rudi M. Brewster. Robert J. Jagiello, Esq., appeared for Plaintiffs, and Donald R. Lincoln, Esq., appeared for Defendant.

Upon consideration of Plaintiffs' Motion for Order Lifting Stay, the papers filed in opposition, and the arguments presented at the hearing, it is hereby ordered:

1. Plaintiffs' Motion for Order Lifting Stay is granted. When the California Supreme Court denied Plaintiffs' petition for review of the Court of Appeal's decision in Yee v. City of Escondido, 224 Cal.App.3d 1349, 274 Cal. Rptr. 551 (1990), Plaintiffs were allegedly denied just compensation for the alleged First Amendment "taking." The court finds that Plaintiffs have thus exhausted their state court remedies as required by Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108 (1985).

2. This Order Lifting Stay does not decide the issue as to whether the rent

control ordinance at issue constitutes a taking. This Order Lifting Stay merely allows the case to continue in federal court without the imposition of the stay entered on June 27, 1989.

IT IS SO ORDERED.

DATED: Mar. 24, 1991

\S\ Rudi M. Brewster
UNITED STATES DISTRICT JUDGE

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APPENDIX G

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN K. YEE and IRENE S. YEE,	CIV. NO. 89-0234-B (CM)
Plaintiffs,	ORDER GRANTING MOTION TO DISMISS
v.	
CITY OF ESCONDIDO, a Municipal Corp.,	
Defendant.	

FILED June 4, 1991.

On May 20, 1991, the above captioned matter came on regularly for hearing before the Honorable Rudi M. Brewster. Robert J. Jagiello, Esq., appeared for Plaintiffs, and Donald R. Lincoln, Esq., and Linda Reich, Esq., appeared for Defendant.

Upon consideration of Defendant's Motion for Reconsideration and Motion to Dismiss, the papers filed in opposition, and the arguments presented at the hearing, it is hereby ordered:

The court has reconsidered its Order filed March 25, 1991, which denied Defendant's Motion to Dismiss on the grounds of res judicata. For the reasons discussed below, the court concludes that this ruling was in error, and finds that the court lacks subject matter jurisdiction to adjudicate whether the Escondido mobile home rent control ordinance constitutes a "taking" pursuant to the Fifth Amendment of the United States Constitution.

a. Procedural Background.

On June 27, 1989, this court stayed the pending action because it found that Plaintiffs' federal constitutional claims

were unripe. Plaintiffs had failed to exhaust the state court procedures for recovery of just compensation for a "taking" of property as required by Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

Plaintiffs returned to state court, but they pursued both their federal and state constitutional claims. On October 31, 1990, the California Court of Appeal for the Fourth District issued its opinion in Yee v. City of Escondido, 224 Cal. App. 3d 1349 (1990). The Court of Appeal held that the challenged ordinance did not constitute a taking of property under either the California or the United States Constitution. The California Supreme Court denied Plaintiffs' Petition for Review on January 24, 1991.

Having exhausted the state court procedures, Plaintiffs returned to this

court and requested the court lift the stay. At the same time, Defendants brought a Motion to Dismiss on the ground that the federal suit was now barred by res judicata. On March 11, 1991, this court lifted the stay and denied Defendant's Motion to Dismiss.

b. The Pending Motion for Reconsideration.

Defendant requests the Court reconsider its denial of Defendant's Motion to Dismiss on the grounds of res judicata.

The court finds that the federal constitutional issues were fully litigated in Yee v. City of Escondido, 224 Cal. App. 3d 1349 (1990). This decision was a valid, final judgment on the merits.

The full faith and credit clause of 28 U.S.C. § 1783 provides that "judicial proceedings . . . shall have the same full

faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . ." Thus, a state court judgment commands the same res judicata effects in federal court that it would have in the court that entered it. The federal district courts are courts of original, and not appellate, jurisdiction. Thus, the proper forum for review of the judgment in Yee v. City of Escondido is the United States Supreme Court, and not the United States District Court. See Rooker v. Fidelity Trust co., 263 U.S. 413, 415-16 (1923) (only the United States Supreme Court can entertain a proceeding to reverse of modify a judgment of a state court for error); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 484-85 (1983) (a federal district court has no authority to review final judgments of a state court

even if the state court decision involves federal constitutional principles).

The court is aware that the interplay between Williamson - which requires exhaustion of state court procedures for a federal taking claim to ripen - and the doctrine of res judicata have placed Plaintiffs in a curious, and frustrating position. By satisfying the exhaustion requirement and litigating the federal claim in state court, Plaintiffs are now barred from litigating the federal claim in federal court. However, the court is unaware of any applicable exception to res judicata which would allow this court to relitigate the federal constitutional issue.[1]

---

[1] In a factually similar case, a district court in New Jersey reached the same conclusion. Peduto v. City of North Wildwood, 696 F.Supp. 1004 (D.N.J. 1988), affirmed, 878 F.2d 725 (3d Cir. 1989) (Plaintiff collaterally estopped from relitigating the federal taking claim

Because this court lacks subject matter jurisdiction, dismissal is proper pursuant to Fed. R. Civ. P. 12(b)(1).

IT IS SO ORDERED.

DATED: Jun 4, 1991

\S\ Rudi M. Brewster
UNITED STATES DISTRICT JUDGE

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since the federal claim had been fully litigated in the state court as required by Williamson).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

John J. Yee and
Irene S. Yee

v.

City of Escondido,
a Municipal Corporation

JUDGMENT IN A CIVIL CASE

CASE NO. CV 89-0234-B (CM)

FILED June 12, 1991

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that because this court lacks subject matter jurisdiction, dismissal is proper pursuant to Fed. R. Civ. P. 12 (b) (1).

Date June 12, 1991

WILLIAM L. LUDDY
Clerk

M. Marner
(By) Deputy Clerk

(2)

Supreme Court, U.S.
FILED
JUL 18 1991
OFFICE OF THE CLERK

No. 90-1947

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

JOHN K. YEE, et al.,
Petitioners,
vs.
THE CITY OF ESCONDIDO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the state court was correct in ruling that the City of Escondido's Mobilehome Rent Protection Ordinance did not constitute a federal taking even though it restricts a park owner's ability to increase space rent whenever a mobilehome is transferred from one homeowner to another.

2. Whether the state court was correct in ruling that the City of Escondido's Mobilehome Rent Protection Ordinance is not a violation of federal substantive due process even though it restricts a park owner's ability to increase space rent whenever a mobilehome is transferred from one homeowner to another.

LIST OF PARTIES

The parties to the proceeding below were the Petitioners, John K. Yee and Irene S. Yee, H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler dba Moonglow Mobile Home Park, Casa De Amigos Mobile Home Estate, Vista Verde, Ltd., Imperial Escondido Mobile Estates and Mildred D. Tacey* and Respondent, City of Escondido.

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*As discussed *infra* at 7-8 n.6, the parties to the proceedings below also included Escondido Mobileparks West, Robert Dolley, et al., Glen Charles DeJong, et al., and Del Dios Mobile Home Estates.

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No. 90-1947

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

JOHN K. YEE, et al., *Petitioners,*
vs.
THE CITY OF ESCONDIDO, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Escondido ("City") respectfully requests that this Court deny Petitioners, John and Irene Yee, et al.'s ("Yee") Petition for Writ of Certiorari ("Petition") seeking review of the California Court of Appeal decision in this case. In the alternative, because the state court was so clearly correct in ruling that the Escondido Rent Protection Ordinance does not effect a federal taking nor violate federal substantive due process, the City respectfully suggests that the Supreme Court grant certiorari and summarily affirm the judgment below; thereby resolving a matter of significant legal interest.

OPINIONS BELOW

On March 30, 1989, the California state trial court (San Diego Superior Court, Case No. N42268) issued its Order granting the City's Motion to Strike Portions of Yee's Complaint, sustaining City's Demurrer and Dismissing Yee's Action. See, Order, Petition at C42-C45.

On October 31, 1990, the California Court of Appeal issued its opinion affirming the Judgment of Dismissal. The opinion is reported at 224 Cal.App.3d 1349, 274 Cal.Rptr. 551; see also, Slip Opinion, Petition at A1-A40.

On January 24, 1991, the California Supreme Court (Case No. S018568) issued its one page ruling denying Yee's Petition for Review. See, Ruling, Petition at B41.

JURISDICTION

The Opinion of the California Court of Appeal, Fourth Appellate District, Division One, was entered October 31, 1990. On January 24, 1991 the California Supreme Court denied Yee's Petition for Review. On April 11, 1991, this Court (per J. O'Connor) entered an order extending the time for filing Yee's Petition until May 24, 1991.[1] On April 30, 1991, this Court (per J. O'Connor) entered an order further extending the time for filing Yee's Petition until June 23, 1991. Yee's Petition for Certiorari was

[1]Neither Yee's April 9, 1991 Application (Appendix to this Opposition at A7-A11) nor the April 11, 1991 Order (Appendix to this Opposition at A12) refer to parties other than Yee. Under the circumstances the extension if time was effective only as to Yee. See, R. Stein et al., *Supreme Court Practice* (BNA 6th Ed. 1986) 318. Therefore to the extent Yee's later filed Petition purports to also be on behalf of any other parties (e.g. H.N. and Frances Berger Foundation, etc.) it is untimely and should be dismissed pursuant to United States Supreme Court Rule 13.1 and 28 U.S.C. section 2101(c)).

docketed with the United States Supreme Court on June 21, 1991. The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. Section 1257.[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The California Constitution, Article I, Sec. 19, provides in pertinent part:

> Private property may be taken or damaged for public use only when just compensation, . . . has first been paid to, or into court for, the owner.

The California Mobilehome Residency Law (Cal. Civ. Code, Section 798 et seq.) governs many aspects of the relationship between a mobilehome park owner and a mobilehome owner residing on a rented space in a mobilehome park. Civil Code, Section 798.55(a) contains legislative justification for the unique protections provided mobilehome owners. Protections include restrictions on terminating a space tenancy (e.g., Civil Code,

[2]Although Yee purported to invoke the Supreme Court's jurisdiction under 28 U.S.C. Section 1257 (federal question jurisdiction) (Petition at 4) at other places in his Petition Yee seems to be trying to cast doubt on whether the federal questions had really been properly presented to the state courts. See, e.g., Petition at 25-44. As explained *infra*, 9-10 at note 9, it is apparent that Yee is making this latter argument to avoid the res judicata/collateral estoppel effect of the state court's decision on its federal claims.

Sections 798.55(b), 798.56) and restrictions preventing a park owner from interfering with or preventing a homeowner from selling his home to a new purchaser as long as the prospective homeowner has the financial ability to pay the space rent and does not have a prior history indicating that he or she will not comply with the rules and regulations of the park. (E.g., Civil Code, Section 798.74).

[California Civil Code, Sections 798.55, 798.56, 798.56(a), and 798.74 are set forth in Appendix D to Yee's Petition at D46-65.]

The Escondido Municipal Code ("EMC"), Article V, Sections 29-101 through 29-108 codified Proposition K (the Escondido Mobilehome Rent Protection Ordinance), an initiative ordinance that established mobilehome rent protection for mobilehome parks located within its jurisdiction.

Under the Ordinance if a mobilehome park owner wants to increase his rent, he must first obtain approval from the Mobilehome Park Rental Review Board. EMC, Section 29-103. To do so the park owner must file an application with the City Community Development Department ("Department"). EMC, Section 29-104(a). Once a rent increase application is determined to be complete by the Department, notice of the application is mailed to the affected homeowners. EMC, Section 29-104(c). The homeowners then have a right to submit written material in response to the application. *Ibid.* Normally the Board must commence a hearing on a completed application within 60 days. EMC, Section 29-104(e). At the hearing, the park owner and the affected homeowners may offer any evidence that is relevant to the requested rent increase. EMC, Section 29-104(f). Following the hearing, the Board, applying various factors, "shall determine

such rent increase as it determines to be just, fair and reasonable." EMC, Section 29-104(g). The Board's determination is final and notice of its decision is mailed to the park owner and the affected homeowners. EMC, Section 29-104(i).

[Pertinent portions of EMC sections 29-103 and 29-104 are set forth in the Appendix to this Opposition at A1-A3.]

STATEMENT OF THE CASE

A. Background.

The City of Escondido is located in Northern San Diego County in the State of California. It has a substantial number of mobilehome parks and mobilehome owners located within its boundaries.[3]

On June 7, 1988, the voters of the City of Escondido, passed Proposition K,[4] an initiative ordinance which established mobilehome rent protection. [Ordinance] The Ordinance became effective July 7, 1988.

B. Procedural History.

1. The State Superior Court Ruling.

On December 1, 1988, prior to seeking any rent increase from the Rental Review Board, Yee, who allegedly

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[3]The October 19, 1990 report by the California Department of Housing and Community Development listed 30 mobilehome parks and 3700 mobilehome spaces in Escondido. The March 27, 1990 County of San Diego "County Wide Mobilehome Task Force Final Report" found that 80% of the mobilehome spaces in the County were occupied by "senior households" who are "generally small elderly families with fixed incomes." *Id.* at 5.

[4]The vote was "yes" [illegible]148 (58.68%), "no" 7,850 (41.32%). *San Diego Union*, June 9, 1988, p. A-4.

owns the Friendly Hills and Sunset Mobilehome Parks located in the City of Escondido, filed a Complaint in the San Diego Superior Court.

Relying on *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1986), *cert. denied,* 485 U.S. 5940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), Yee alleged that the Ordinance constituted a "taking" of his property in violation of Article I, Section 19 of the California Constitution and the Fifth and Fourteenth Amendments of the United States Constitution and a deprivation of civil rights under color of law in violation of 42 U.S.C. Sections 1981 and 1983 because it did not permit him to automatically raise rents whenever a mobilehome was sold on site.[5] The Complaint sought declaratory and injunctive relief and damages in the amount of $6,000,000 plus attorneys fees and costs.

The City responded by demurring and moving to strike portions of the Complaint. On March 31, 1989, the Honorable Don Martinson, Judge of the San Diego Superior Court granted the Motion to Strike, sustained the General Demurrer without leave to amend, and on its own motion dismissed the entire action. See, Order, Petition at C42-C45.

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[5]While not specifically alleged in his Complaint Yee argued at the Demurrer hearing and in later appellate briefs that the same provisions also violated federal substantive due process.

2. The State Court of Appeal Decision

On June 8, 1989, Yee filed a Notice of Appeal with the state Court of Appeal.[6]

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[6]Despite the trial court's ruling that the above allegations did not state a cause of action, during the period May 12, 1989 to June 16, 1989, eleven (11) additional suits were filed by other mobilehome park owners challenging the Ordinance and seeking a sum total of over $40,000,000 in damages from the City.

[While some of these Complaints purported to rely only upon Article I, Section 19 of the California Constitution, during the Demurrer hearings or on appeal all park owners also raised federal taking and substantive due process challenges.]

By late September 1989 each of the cases had been dismissed by the San Diego Superior Court and all cases had been appealed to the state Court of Appeal. (*Del Dios Mobilehome Estates v. City of Escondido,* San Diego Superior Court No. N43698, *on appeal,* 4th Dist. Div. One No. D011030; *Richard C. Kuebler dba Moonglow Mobile Home Park v. City of Escondido,* San Diego Superior Court No. N43740, *on appeal,* 4th Dist. Div. One No. D010942; *Mountain Shadows Mobile Home Estates v. City of Escondido,* San Diego Superior Court No. D43830, *on appeal,* 4th Dist. Div. One D010805; *Casa De Amigos Mobile Home Estates v. City of Escondido,* San Diego Superior Court No. N43847, *on appeal,* 4th Dist Div. One No. D010972; *Vista Verde v. City of Escondido,* San Diego Superior Court No. N43873, *on appeal,* 4th Dist. Div. One No. D011011; *H.N. and Frances Berger Foundation v. City of Escondido,* San Diego Superior Court No. N43874, *on appeal,* 4th Dist. Div. One No. D010769; *Robert Dolley et al., v. City of Escondido,* San Diego Superior Court No. N43924, *on appeal,* 4th Dist. Div. One No. D011028; *Escondido Mobile Park West v. City of Escondido,* San Diego Superior Court No. N43925, *on appeal,* 4th Dist. Div. One No. D011027; *Imperial Escondido Mobile Estates v. City of Escondido,* San Diego Superior Court No. N43926, *on appeal,* 4th Dist. Div. One No. D011026; *Glen Charles DeJong et al., v. City of Escondido,* San Diego Superior Court No. N43927, *on appeal,* 4th Dist. Div. One No. D011029; *Tacey v. City of Escondido,* San Diego Superior Court No. N44050, *on appeal,* 4th Dist. Div. One No. D011115.)

On October 31, 1990, in a decision reported as *Yee v. City of Escondido,* 224 Cal.App.3d 1349, 174 Cal.Rptr. 551 (1990) (see also, Slip Opinion, Petition at A1-A40), the Court of Appeal Affirmed. It began by indicating that it was "revisit[ing] an issue of federal constitutional law we first considered several years ago in Oceanside . . . ." *Yee,* 224 Cal.App.3d at 1354. The Court then pointed out that:

> "[p]laintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a "fair" rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no "taking." The fact that used mobilehomes in Escondido are selling for more than they have in the past is irrelevant."

224 Cal.App.3d at 1354.

The Court examined Hall and its legal underpinnings and concluded that *Hall* was "an interpretative misstep" (224 Cal.App.3d at 1351n.1),[7] had misapplied *Loretto v. Teleprompter Manhatten CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3165, 73 L.Ed.2d 868 (1982), and was inconsistent with subsequent decisions of the United States Supreme Court including *FCC v. Florida Power Corp.,* 480 U.S.

On May 21, 1990, pursuant to stipulation of the parties, all cases were consolidated for purposes of appeal and decision by the Court of Appeal. The parties further agreed that all cases would be submitted for decision by the Court of Appeal on the Briefs and oral argument in the *Yee* case. See Stipulation and Order, as set forth in the Appendix to this Opposition at A4-A6.

[7]*Yee* also concluded that *Pinewood Estates of Michigan v. Barnegat Township Leveling Board,* 898 F.2d 347 (3rd Cir. 1990), "suffers from a similar defect." 224 Cal.App.3d at 1356n.6.

245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). *Yee,* 224 Cal.App.3d at 1354-1358.

3. The State Supreme Court Ruling.

On December 3, 1990, a Petition for Review was filed by Yee on behalf of himself and all other parties[8] seeking review from the California Supreme Court.

On January 24, 1991, the California Supreme Court denied Yee's Petition for Review. See, 1991 Cal. LEXIS 353; see also, Ruling Slip Op., Petition at B41.[9]

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[8]On or about January 9, 1991, counsel for Yee filed notice of withdrawal of Del Dios Mobilehome Estates from that Petition.

[9]On February 14, 1989, Yee filed a Complaint in the United States District Court for the Southern District of California. *Yee v. City of Escondido,* S.D. Cal. No. 89-0234-B (CM). In its federal suit, Yee raised essentially the same claims it had raised in the state suit contending that the City's Ordinance was both a public and private "taking" and violative of substantive due process under the Fifth and Fourteenth Amendments and 42 U.S.C. Section 1983 and Section 1985. The City responded with a motion to dismiss under F.R.C.P. Rules 12(b)(1) and (6) for lack of jurisdiction and for failure to state a claim primarily arguing that the federal suit was barred by res judicata/collateral estoppel based on the state court rulings on the same claims.

After initially staying the federal action, pending the plaintiffs' exhaustion of its state court remedies (see Order, Petition at E66-E68), on June 4, 1991 the Honorable Rudi Brewster, United States District Judge, issued a Judgment of Dismissal. See Order Granting Motion to Dismiss, Petition at G72-G78. Judge Brewster found that Yee's federal constitutional issues had been fully litigated and that the state court ruling was a valid, final judgment on the merits. *Id.* at G75. After noting that federal district courts are courts of original not appellate jurisdiction, the Court concluded that the proper forum for review of the state court judgment was the United States Supreme Court not the United States District Court, citing *Rooker v. Feldman* 263 U.S. 413, 415-416, 44 S.Ct. 149, 68 L.Ed.2d 362 (1923)

WHY THIS WRIT SHOULD BE DENIED OR IF GRANTED WHY THE JUDGMENT BELOW SHOULD BE AFFIRMED

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED *YEE'S* TAKING CLAIM

Yee apparently bases its argument for granting this Writ of Certiorari on United States Supreme Court Rule 10(b) contending that the *Yee* state court decision conflicts with two federal appellate court decisions, *Hall, supra,* and *Pinewood, supra.* In fact, the Court below fully considered both decisions and found them distinguishable and against the weight of authority as set forth in subsequent federal and state court rulings.

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and *District Court of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 484-485, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). Order, Petition at G76. [On June 21, 1991, the same day Yee filed its Petition, Yee also filed a Notice of Appeal to the Ninth Circuit from the June 4, 1991 Order.]

Much of Yee's effort in this Petition (e.g., "Questions Presented," Nos. 3 and 4 (Petition ii); "Argument", "The federal claim did not even exist at the time the state court purported to dispose of it" (Petition 25-44); and "Conclusion", "to remand to the owner court with instructions to limit its decision to state constitutional issues . . . [or] order the federal courts to take jurisdiction of Petition claims." (Petition 49)) is apparently designed to circumvent the federal district court res judicata ruling. In this regard, it should be noted that before receiving what it now considers an adverse ruling from the state courts, Yee made no attempt to reserve its federal claims from state court adjudication.

A. The *Hall* Rationale Has Been Undermined By Subsequent Cases.

1. The *Hall* Ninth Circuit Panel Decision.

In August 1984, the City of Santa Barbara enacted a mobilehome rent control ordinance. One of the key provisions required "mobile park operators to offer their tenants leases of unlimited duration." 833 F.2d at 1273. The Halls filed suit in federal district court claiming that by giving the tenants such a "perpetual lease" at a below market rental rate, the ordinance transferred to the tenants a possessory interest in the Halls' land. They alleged the prices of the mobilehomes increased after enactment of the ordinance and that this increase reflected a "taking" from the park owner. 833 F.2d at 1274. After reviewing those allegations, the District Court granted the City's Motion to Dismiss. *Ibid.*

On appeal, a Ninth Circuit panel reversed. After discussing both "regulatory taking cases" (e.g., *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), *reh. den.,* 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978), and "physical occupation cases" (e.g., *Loretto,* supra, the panel concluded "when viewed in the light most favorable to the Halls" the allegations seemed to present a claim for taking by physical occupation. 833 F.2d at 1276. Pointing out that the ordinance directed the landlord to give the tenant an indefinite lease, the panel concluded "[t]he right to occupy property in perpetuity is surely the type of property that is protected by the taking clause." *Ibid.*

After pointing out that the Santa Barbara Ordinance had apparently been enacted solely to alleviate "a critical shortage of low and moderate housing," the panel also indicated that it had significant doubts that the Ordi-

nance was rationally related to that end. 833 F.2d at 1280-81.[10]

[It is unfortunate that at the time the *Hall* panel made its decision it was apparently unaware of the discussion of similar claims in *Oceanside Mobilehome Park Owner's Ass'n. v. City of Oceanside,* 157 Cal.App.3d 887, 906-907, 204 Cal.Rptr. 239 (1984). There the Court specifically dismissed the argument that the combined effect of California Mobilehome Residency Law (Civil Code section 798 et seq.) and the local ordinance constituted a taking merely because "a selling tenant with a favorable rent controlled lease may be able to sell the onsite mobilehome for a higher price than can be obtained for the identical mobilehome situated in an unregulated park." 157 Cal.App.3d at 906-907. Had the Ninth Circuit been aware that *Oceanside* had previously considered and decided the same claim, it may have ruled quite differently.][11]

2. The Dissent From Denial Of Rehearing.

The *Hall* panel denied a petition for rehearing. 833 F.2d at 1281. A suggestion for rehearing en banc was also rejected, with three Circuit Judges dissenting. *Ibid.* The three dissenters correctly treated the rent control ordi-

[10]The panel also indicated their feelings toward rent control in general by questioning its overall rationality. See, 833 F.2d at 1281n.26.

[11]For example, the *Hall* panel described the Halls' claim as being "novel." 833 F.2d at 1273. Later after examining several rent control cases, the panel stated: "In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferrable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." 833 F.2d at 1278.

nance as an economic regulation and pointed out that the ordinance was similar to three rent control cases that the Supreme Court had dismissed as lacking a substantial federal question[12] and concluded "*The panel decision is thus contrary to controlling authority.*" 833 F.2d at 1282 [emphasis added].

The three dissenters also pointed out that the panel's rationality argument was flawed and that, because a Court does not have the power to sit as a "superlegislature," legislation passes constitutional muster if the legislature could have concluded that its action would promote a legitimate state interest. 833 F.2d at 1284.[13]

The City of Santa Barbara's Petition for a Writ of Certiorari was denied. *City of Santa Barbara v. Hall,* 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

3. *FCC* Undermined The *Hall* Rationale By Finding No Taking Where A Property Owner Had Voluntarily Entered Into A Lease Subject To Rent Regulation.

Subsequent to the Hall panel's decision, the Supreme Court decided *FCC, supra.* There, this Court dismissed a utility's argument that a federal statute which authorized the FCC to determine the rates which it could charge a

[12]See, *Fisher v. City of Berkeley,* 471 U.S. 1124, 105 S.Ct. 2653, 86 L.Ed.2d 270 (1985); *Nash v. City of Santa Monica,* 470 U.S. 1046, 105 S.Ct. 1740, 84 L.Ed.2d 807 (1985); *Fresh Pond Shopping Center v. Callahan,* 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983).

[13]The Dissenters also correctly predicted that the *Hall* panel decision "... is an authorization for broad, wholesale attacks upon rent control regulation. It casts a shadow upon all economic regulation. Our court must now sit idly by and watch taxpayer's money and court time being expended in litigation over the effects of this decision." 833 F.2d at 1284.

cable TV system for the use of its poles constituted a "taking." The Court pointed out that the statute did not require the utility to rent its poles but merely regulated the rents charged once it had decided to rent. 480 U.S. at 251. The Court noted that unlike *Loretto, supra,* the public utility landlords had *voluntarily* entered into the leases with cable company tenants stating:

> [I]t is the invitation, not the rent which makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government lease.

Id. at 252-253.

The Court after also reiterating that, "statutes regulating the economic relations of landlord and tenants are not *per se* takings," dismissed the contention that the rent regulation was a taking. *Ibid.*

4. *Pennell* Rejected *Hall's* Rationale And Upheld The Rationality Of A Rent Control Ordinance Which Considered Tenant Hardship.

In *Pennell v. City of San Jose,* 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988), this Court in upholding San Jose's rent control ordinance, not only refused to declare rent control a "per se" taking[14] (see, 485 U.S. at 12n.6), but also rejected the landlord's due process argument that the only legitimate purpose of the statute was to prevent rent increases caused by housing shortages and that the objective of alleviating individual tenant hardship was not

[14]The Amici Briefs (available on LEXIS) urging such action relied in great part on the *Hall* panel dicta (see, e.g., 833 F.2d at 1281n.26) that rent control should be considered a "per se" taking.

a policy that the legislature was free to adopt in a rent control ordinance. 485 U.S. at 12.

The Court pointed out that "a legitimate and rational goal of rate regulation is the protection of consumer welfare", and the consideration of tenant hardship as a factor to be considered in determining rent increases "represents a rational attempt to accommodate the conflicting interests of adjudicating tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." 485 U.S. at 13.

5. *Eamiello* And *Thompson* Rejected The *Hall* Rationale And Upheld The Rationality Of A Statute Designed To Protect The Economic Interest Of Mobilehome Owners In Selling Their Homes On Site.

Eamiello v. Liberty Mobile Home Sales, 208 Conn. 620, 546 A.2d 805 (1988), *app. dism.,* 489 U.S. 1002, 109 S.Ct. 1104, 103 L.Ed.2d 169 (1989), also examined the *Hall* rationale and rejected its reasoning. There, the park owner, relying upon *Hall,* argued that a state statute which permitted a homeowner to sell his mobilehome on site was unconstitutional and constituted a "taking." 546 A.2d 815. The Connecticut Court after reviewing *Hall* declined to apply its rationale. 546 A.2d 816. It concluded that the statutory restrictions on the right of the park owner to control the term of the lease and the identity of the lessee was not sufficiently analogous to a physical occupation of the property to violate the federal "takings" clause. Second, it determined that there were significant differences between the Connecticut mobilehome statute[15]

[15]While Connecticut General Statute Section 21-79 is not a rent control statute, it does provide a form of "vacancy control." It

and the Santa Barbara Ordinance. *Ibid.* The Court after reviewing *Loretto, FCC,* and *Fresh Pond,* distinguished *Loretto,* pointing out that a mobilehome owner's right to occupy a mobilehome space was originally obtained "consensually" indicating that in entering into such a lease the park owner has transferred his "possessory interest" in the land to the homeowner in return for rents.[16] *Id.* at 818.

After noting that often, due to restrictive zoning, park owners have a "monopoly" (*Id.* at 819), the Court continued and pointed out mobilehome owners had a substantial investment in their homes[17] and allowing an on-site sale "serves a substantial public purpose in protecting the economic interests of mobilehome tenants in selling their homes on site." *Id.* at 819. After noting that there, the homeowner's home had been purchased for $12,500, and

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concludes with the following words: "No owner shall exact a commission or fee with respect to the price realized by the seller, unless he has acted as agent for the seller on a sale pursuant to a written contract, *or charge a rent for the mobile manufactured home space or lot upon which the purchased mobile manufactured home is located greater than the prevailing rate for any other space or lot located in the park.*" [emphasis added]

The first clause is similar to Cal. Civil Code Section 798.72 (Park owner cannot charge a *fee* to either a homeowner or prospective homeowner on change of ownership unless he performed a service). The second clause is similar to the Escondido Ordinance in that it puts limits on the right of park owners to raise *rents* upon transfer.

[16]The Court concluded that the restrictions put on the park owner's right to reject a transferee were quite similar to the common provision that a landlord may not unreasonably withhold his consent to the assignment of a lease by a tenant. See, 546 A.2d at 818.

[17]*Manheim,* "Tenant Eviction and the Taking Clause," 1989 Wisc.L.Rev. 925, 956n.179, notes that modern mobilehomes often cost between $30,000 and $75,000.

was worth $17,000 if sold on site but only $3,500 if it had to be moved, the Court concluded that the statute "protects tenants at mobilehome parks from being forced to sell to park owners at a substantial loss and as a consequence benefits many low income people who cannot otherwise afford to purchase a more expensive home." *Ibid.*

The Court recognized that the state statute which restricted rent increases on transfer might result in the homeowner receiving a greater price for his home because of the statutory right of the purchaser to continue occupancy of the site, but, nevertheless, upheld the statute concluding that because the state had created the site value through regulatory scarcity (e.g., zoning) it could constitutionally repose any sales premium in the homeowner rather than the park owner. *Id.* at 820.

The Court concluded:

> In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising form the near-monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle. In our view, Section 21-79 strikes a reasonably fair balance between the economic interests of mobile home tenants and those of mobile home park operators.

Ibid.

In *Thompson v. Merlino Enterprises,* 208 Conn. 656, 545 A.2d 1094 (1988), *app. dism.,* 488 U.S. 1024, 109 S.Ct. 829, 102 L.Ed.2d 962 (1989), the Connecticut Court relying on *Eamiello, supra,* upheld the right of an administrator of an estate to sell a mobilehome on site recogniz-

ing that the home had a value of $11,000 if sold on site and almost no value if sold off site. See, 545 A.2d at 1097.

6. *Sperry* Indicates That A Mere Loss Of Money Is Not A Physical Taking.

More recently, in *United States v. Sperry Corp.*, 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989), this Court held that a statute which required American claimants to pay the United States a percentage of the monetary rewards made by the Iran-United States Claims Tribunal was neither a "taking" nor a violation of the due process clause. In so doing, this Court, reversed the Court of Appeals which held that the payment was a "permanent physical occupation" of property and therefore a "per se taking" under *Loretto, supra,* stating:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case was a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto.*

110 S.Ct. at 395n.9.

Here, as in *Sperry,* and unlike *Loretto,* there is no new physical property that is being occupied due to the ordinance. As in *Sperry,* the only difference is that without

the ordinance, the park owner might have been able to obtain more money or profit.[18]

Because *Sperry* holds that mere economic loss is not sufficient to constitute a "physical taking", one of the last underpinnings of the *Hall* panel's rationale has been undermined.

7. The Third Circuit's Decision In *Pinewood* Is Also Flawed Because It Failed To Consider Binding And Relevant Authorities.

In *Pinewood Estates of Michigan v. Barnegat Township Leveling Board, supra,* the park owner sued in federal court[19] alleging that the rent leveling ordinance of the Township of Barnegat, New Jersey took their property by

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[18]See, Note, "The Constitutionality of Rent Control Restrictions on Property Owner's Dominion Interests", 100 Harv. L. Rev. 1067, 1084n.106 (1987) (Note concludes there was no indication that the ordinance in *Hall* frustrated any interest of the plaintiffs other than the desire for greater profits). See also, *Manheim, supra,* 1989 Wisc.L.Rev. at 964-969 (Questioning the Hall panel's conclusion that a right to raise rents on transfer is a discrete property interest).

[19]It is unclear whether or not the federal court had proper jurisdiction over the case. The Complaint apparently alleged a "taking", therefore, it should have been brought in state court, assuming that New Jersey has adequate procedures for such inverse condemnation cases. See generally, *Williams County Regional Planning Comm'n. v. Hamilton Bank,* 473 U.S. 172, 196-197, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

See also, *Sinaloa Lake Owner's Ass'n. v. City of Simi Valley,* 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990), explaining that it was proper for *Hall* to be brought in the federal courts because it was originally filed at a time, prior to *First English [First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)], when California state courts would not award damages for ordinances which constituted a taking.

prohibiting them from increasing rents to a new mobilehome owner who bought the mobilehome, in place, from an existing resident. The District Court granted a Motion to Dismiss holding that the ordinance was a constitutional regulatory ordinance. 898 F.2d at 350.

On appeal, a Third Circuit panel reversed, holding that to the extent that the ordinance granted the homeowners a transferable possessory interest in the park owners land, it constituted a "physical taking" under *Loretto, supra. Id.* at 353-354.[20] After opining that "vacancy decontrol"[21] might solve the problem by permitting the park owner to raise rents to eliminate any "premium" (*Id.* at 353), the Court dismissed the argument that the park owners were being adequately compensated for their loss because the ordinance provided them with a "constitutionally adequate rent for the occupancy of the tenants as such." *Ibid.*

A careful analysis of *Pinewood* indicates that the Court apparently never considered a number of relevant decisions, e.g., *FCC, Pennell, Eamiello, Thompson, Sperry,* and *Oceanside, supra.*

Therefore, the *Pinewood* Court apparently never considered that, unlike *Loretto,* a mobilehome owner's right to occupy a mobilehome space is originally obtained "consensually" (*FCC, supra,* 480 U.S. at 252); that a park owner transfers his "possessory interest" in his land to

[20]The Court also noted that *Hall, supra,* had reached a similar conclusion. 898 F.2d at 353-354.

[21]Throughout its Petition Yee often refers to the restrictions on its right to raise rents on transfer as a "vacancy control" provision. Although some courts have also used this terminology, it is a misnomer because since mobilehomes are almost always sold "in place", there is rarely a space "vacancy."

the mobilehome owner in return for rents (*Eamiello, supra,* 546 A.2d at 818), and that since the state has created the site value through regulatory scarcity (e.g., zoning) it could constitutionally repose any sales premium in the homeowner rather than the park owner. *Eamiello, Id.* at 820.

They failed to consider that the only park owner's "property interest" frustrated by the ordinance was his desire for greater profits and that such an interest does not qualify for a physical taking. See, *Sperry, supra,* 110 S.Ct. at 395n.9.

The *Pinewood* panel's comments about the desirability of "vacancy decontrol" clearly indicated that they were unaware that "mobilehome owners are enclosed within a captive market" (*Oceanside, supra,* 157 Cal.App.3d at 910); that "park owners have a monopoly," (*Eamiello, supra,* 546 A.2d at 819) and that "taken collectively the [mobile] homeowners have a greater investment than does the [mobile] home park owner", *Oceanside, supra,* 157 Cal.App.3d at 911n.9. The Court, therefore apparently never considered the public interest in protecting the mobilehome owner's investment. See, *Eamiello, supra,* 546 A.2d at 819.[22]

[22]By requiring that space rent not be arbitrarily increased upon the sale of a home or occurrence of a space vacancy, the Escondido Ordinance adds certainty to the mobilehome market, prevents abusive rents which result in a destruction of the equity that a homeowner has in his or her home, stabilizes rents among spaces in a park, and assures continuation of mobilehome living as a legitimate housing option.

The grim reality of what happens when arbitrary increases are made on transfer is only recently becoming public. On remand from the Ninth Circuit decision, the Halls were able to convince the trial court that there was a rent control sales premium and received a

8. Recent Decisions Show That Even The Ninth Circuit Is Struggling With The *Hall* Rationale.

In *DeAnza Properties X Ltd. v. County of Santa Cruz,* ____ F.2d ____, 1991 9th Cir. Slip Op. 7983, 1991 U.S. App. Lexis 13254 (9th Cir. No. 89-15750, June 28, 1991), the plaintiff mobilehome park owners (DeAnza) brought federal taking and due process challenges to vacancy control provisions of the County's mobilehome rent control ordinance. 1991 9th Cir. Slip Op. at 7986. The District Court dismissed on statute of limitations grounds because the challenged provision had been enacted in

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substantial damage award. Prior to appeal to the Ninth Circuit, the case settled when the City of Santa Barbara agreed to lift all restrictions on rent increases at the time of transfer. Almost immediately, Mrs. Hall informed certain park residents that she was going to raise rent on any transfer by $250 to $300 per month. As a result, homes which a few months before had been purchased for $80,000 became virtually unsalable.

For example, Mrs. Hall's attorney, Mr. Jagiello, has publicly stated: ". . . in the Hall park over the last two years, not one coach has sold, although many are for sale, but for the exception of a coach that sold two weeks ago for one dollar. There were attempts to give coaches away to charities and they wouldn't take them. There is no market for coaches in Santa Barbara." See, Administrative Record to *Palomar Estates East v. City of San Marcos,* San Diego Superior Court No. N48882, April 9, 1990 Hearing Transcript at 7.

It is clear that in the absence of vacancy control certain unscrupulous park owners will take much more than the so called "rent control premium" they will take "all the market can bear," that is all the homeowner's equity. Thus, a homeowner who in good faith invested in a home, recognizing the reality that the home could not be moved, under the *Hall* theory is faced with the prospect of losing the value of his or her investment or remaining a captive in the mobilehome park.

Unless homeowners and their lenders are assured that the value of a home will remain relatively stable, the mobilehome market will evaporate, investments will be lost, and a legitimate affordable housing option will be lost.

1982 more than five years before DeAnza filed the suit. *Ibid.*

On appeal, the Ninth Circuit affirmed, ruling that under *Hall,* a cause of action accrues when the County enacts the ordinance (*Id.* at 7987-7988) and that subsequent amendments do not start the period running again as long as the challenged provision remains the same. *Ibid.* The Court also dismissed the argument that a new cause of action accrues each time a resident sells his mobilehome. *Id.* at 7989-7990.

In *Sierra Lake Reserve v. City of Rocklin,* ____ F.2d ____, 1991 9th Cir. Slip Op. 8463, 1991 U.S. App. LEXIS 14119 (9th Cir. 89-15731, July 9, 1991, a different panel reversed a district court which had dismissed a *Hall* taking challenge on ripeness grounds. The panel indicated that in light of the consistent California decisions which had rejected *Hall* taking claims, it was no longer necessary to abide by *Williamson County* state court exhaustion requirements. 1991 9th Slip Op. at 8471. A concurring Circuit Judge while indicating that he felt bound by the *stare decisis* effect of *Hall* noted that *Hall* had reached a "commendable *legislative result* by calling a regulatory ordinance a physical taking" [emphasis added.] *Id.* at 8479.[23]

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[23]In addition to the above cases, a LEXIS search disclosed two additional unpublished Memorandum Decisions in which the Ninth Circuit distinguished or limited *Hall.* See, *Page v. City of Rialto,* 1991 U.S. App. LEXIS 1272 (Memorandum, 9th Cir. Nos. 88-6588, 88-6638, filed January 25, 1991) (Court affirmed dismissal of challenges to mobilehome rent control ordinance including *Hall* taking and substantive due process challenges, distinguishing the Rialto Ordinance from that involved in *Hall*); *Kuebler v. City of Escondido,* 1991 U.S. App. LEXIS 10,948 (Memorandum, 9th Cir. No. 90-55708, filed May 21, 1991) (Court affirmed dismissal of *Hall* substantive due process challenge to Mobilehome Rent Protection Ordinance on

B. Every California Court Which Has Considered The Issue Has Rejected The *Hall* Rationale.

In addition to *Oceanside* and *Yee, supra,* every other California appellate court which has directly considered the issue has rejected the *Hall* rationale.

For example in *Casella v. City of Morgan Hill,* 230 Cal.App.3d 43, 280 Cal.Rptr. 876 (1991), the Court rejected a challenge to the City of Morgan Hill's mobilehome rent control ordinance claiming that its lack of a "vacancy decontrol" provision which allows rents to be increased when a mobilehome is transferred was a "taking." In carefully analyzing the *Hall* decision (*Casella,* 230 Cal.App.3d at 49-57), the Court concluded:

> We find *Hall* distinguishable in a way we think the Supreme Court would find material. (833 F.2d at p. 278) Like the California appellate district which has considered the issue before us (see *Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349), we repudiate *Hall*'s attempt to bootstrap a mobile home rent control ordinance — an economic regulation — to the Supreme Court's "very narrow" holding in *Loretto.*

Id. at 52.

The Court continued its analysis stating:

> As *Yee* and others have pointed out, the increase in the sales prices of mobile homes resulting from rent control may simply reflect the artificially low price caused by excessive rents charged prior to its enact-

---

ripeness grounds because park owner had not exhausted administrative remedies under the Ordinance). Consistent with Ninth Circuit Rule 36-3, the above unpublished cases are not being referred to for precedential purposes but merely to inform this Court of the way other Ninth Circuit panels are struggling with the *Hall* rationale.

> ment. The mere fact that increased coach prices are a corollary to rent control does not establish that a taking has occurred . . . .

Id. at 54.

Finally, the Court rejected Hall's analysis of substantive due process by concluding:

> The stated purpose of the city's ordinance is to control excessive rental prices for the largely fixed-income residents of mobile home parks. This is unquestionably a legitimate state interest. The City of Morgan Hill could reasonably have concluded that the mobile home rent control ordinance would promote this goal. Whether as a means to achieve its stated purpose rent control is a good idea is a political decision — one which properly rests with the legislative branch of government. We agree with *Yee* that this is "not a question of constitutional law for the courts."

Id. at 57.[24]

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[24]Several California Courts of Appeal have also issued unpublished decision affirming dismissals of *Hall* taking challenges to mobilehome rent control ordinances. See, e.g., *Tubach v. City of San Marcos* (4th Civ. No. D011098, December 11, 1990), *rev. denied,* (Cal. Supreme Ct., No. S019270, February 27, 1991; *Palomar Mobilehome Park Ass'n. v. City of San Marcos,* (4th Civ. No. D011484 filed February 6, 1991), *review denied* (Cal. Supreme Ct. No. S019940, April 17, 1991), Pet. for Cert. docketed (United States Supreme Court No. 90-1824, May 28, 1991); *Peppard v. City of Carpinteria,* 226 Cal.App.3d 812, 278 Cal.Rptr. 100 (1991), *rev. den. and opinion ordered depublished,* 1991 Cal. LEXIS 1293 (Cal. Supreme Ct. No. S019552, filed March 21, 1991). Consistent with California Rules of Court, Rule 976, the above unpublished cases are not being referred to for precedential purposes but merely to inform this Court that other California courts have also rejected the *Hall* rationale.

C. In Any Event, The Escondido Ordinance Is Distinguishable From That Considered In *Hall*.

The Santa Barbara Ordinance discussed in *Hall* put various restrictions on a park owner's right to terminate a mobilehome owner's space lease and required mobilehome park owners to offer leases of unlimited duration. See *Hall*, *supra*, 833 F.2d at 1273.

There are no similar restrictions in the Escondido Ordinance.[25] To the extent that the homeowners are given the right to occupy and use the park that right is granted not by the Escondido Ordinance, but instead by state law. See, Mobilehome Residency Law, Cal. Civil Code, Sections 798.56, 798.74. This fact by itself is sufficient to distinguish *Hall*.

II

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THAT THE ORDINANCE ADVANCES A LEGITIMATE GOVERNMENTAL PURPOSE AND DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

Yee also contended (Petition at 14-15) that the Ordinance violates substantive due process because its vacancy control provision does not advance a legitimate governmental purpose.

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[25]Yee's implications to the contrary (Petition at 8) are erroneous. The only Ordinance restrictions on termination are in EMC section 29-106 which apply only to a "tenancy which is not subject to the provisions of the Mobilehome Residency Law" (e.g., someone who rents a mobilehome from a homeowner). As to these persons, the termination provisions are virtually identical to those applied to homeowners in the Mobilehome Residency Law.

The Escondido Ordinance seeks to remedy an inequitable market situation caused by the scarcity of mobilehome spaces by protecting mobilehome owners from unreasonable space rental increases therefore protecting the homeowner's investments, while also providing park owners with a just and reasonable return on the park owner's investment.

The Courts have found rent control legislation to be a reasonable and legitimate means of addressing problems related to scarcity in rental property and the high rents resulting from inequities in bargaining power. See, e.g., *Pennell*, *supra*, 485 U.S. at 13-14 (Court upheld rent control ordinance which required consideration of hardship to low income tenants of rent increase); see also, *Schnuck v. City of Santa Monica*, ____ F.2d ____, 1991 9th Cir. Slip. Op. 6877, 6885, 1991 U.S. App. LEXIS 11113 (9th Cir. No. 89-55283, June 4, 1991) (Court held City had a legitimate interest in imposing eviction controls as part of rent control ordinance to "protect tenants from the high cost of dislocation in the tight housing market, and prevent landlords from arbitrarily evicting tenants simply to obtain higher rents from new tenants.").

In *Oceanside*, *supra*, the Court noted that "the ordinance recognizes not only the realities of a captive market, but also the proprietary interests mobilehome owners have individually and cumulatively in their homes and appurtenances." *Id.* at 910-911.[26]

In *Azul Pacifico v. City of Los Angeles*, 740 F.Supp. 772 (C.D. Cal. 1990), *on appeal*, 9th Cir. No. 90-55853, the

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[26]In an accompanying footnote, the Court noted that "the continuing possibility of unreasonable space rental increases in manufactured home parks threatens to diminish the value of the investment of the manufactured home owners." 157 Cal.App.3d at 911n.9.

District Court reached a similar conclusion. Although the Court considered itself bound by *Hall* to find a "taking" (*Id.* at 781), it nevertheless set forth its conclusion that a legitimate state interest justified the City's enactment of the Rent Stabilization Ordinance ("RSO") including the "vacancy control" provisions. *Id.* at 780. The Court noted:

> Based on testimony from mobile home tenants, the City found that, without vacancy control, it would be virtually impossible for tenants to sell their homes on the pad because landlords could raise the rents to a level that prospective buyers could not afford.

Ibid.

Pointing out that "the Supreme Court has long held that protection of consumer welfare is a legitimate and rational goal of price control" (*Ibid.*), and that rent control has long been held constitutional as "a legitimate exercise of the state's police power" (*Id.* at 781), the Court determined that "the mobile home market is an example of a monopoly, which is a market *failure*, rather than a market, and is a prime candidate for governmental regulation." *Ibid.*[27]

The Court below properly ruled that the Ordinance advances a legitimate purpose and is not a violation of substantive due process.

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[27]In its recent *Sierra Lake* decision, the Ninth Circuit also ruled that the enactment of a vacancy control ordinance did not violate substantive due process. *Sierra Lake, supra,* 1991 9th Cir. Slip Op. at 8477.

CONCLUSION

Yee's Petition is untimely filed as to all parties except the Yees themselves and therefore the Petition on behalf of the other parties should be dismissed.

To the extent that Yee's Petition seeks to raise issues never presented below, i.e., whether the federal claim did not exist at the time the state court ruled (see, Yee's Petition at 31-44), it should also be summarily denied. See, e.g., *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) (Traditionally the Court refuses to "decide federal constitutional issues raised here for the first time on review of state court decisions").

Respondent City also respectfully submits that the Court should deny Yee's Petition seeking review of the taking and due process decisions of the state court because it is clear that these decisions were properly made.

However, City recognizes that this case raises an important issue of "taking jurisprudence", i.e., whether a "taking" exists in the context of the regulation of space rent to new residents in a mobilehome park.[28] Therefore in the alternative, Respondent City respectfully suggests that if this Court decides that the petition presents an important issue justifying a grant of certiorari, review

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[28]Counsel for Respondent are aware that the issue of whether a mobilehome rent review ordinance which prevents or restricts rent increases on the sale of a mobilehome in place in a park is a "taking" is of major concern to many cities and other local governments, mobilehome park owners and mobilehome residents throughout California and perhaps the nation. For example, the League of California Cities has established a special subcommittee to address this and related issues. The need to resolve this issue in order to protect mobilehome living as a legitimate housing option should not be minimized.

should be limited to consideration of the taking issue. Finally, City respectfully suggests that a grant of certiorari and a decision summarily affirming the state court decision would remove the "shadow" caused by *Hall* (see *Hall, supra*, 833 F.2d at 1284) and prevent further wasteful litigation on this issue.[29]

Dated: July 18, 1991

Respectfully submitted,

DONALD R. LINCOLN
(Counsel of Record)
LINDA B. REICH
ENDEMAN, LINCOLN, TUREK & HEATER

DAVID R. CHAPMAN, City Attorney
JEFFREY EPP, Asst. City Attorney
CITY OF ESCONDIDO

Attorneys for Respondent
City of Escondido

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[29]Yee is the second petition filed with this Court raising the same issues. A Petition in *Palomar v. City of San Marcos*, United States Supreme Court Docket No. 90-1824 was filed on May 28, 1991. Several other cases in which *Hall* type challenges have been raised to local mobilehome rent review ordinances are currently at some stage of the state (e.g., *Casella, supra*) or federal (e.g., *Azul, supra*) appellate process and may ultimately reach this Court.

APPENDIX A

ARTICLE V. MOBILEHOME RENT CONTROL

Sec. 29-103. *Base rent.*

Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986.... No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the board.

Sec. 29-104. *Permitted rent increases based upon an application approved by the board.*

(a) An owner may file with the department a rent increase application for one or more mobilehome spaces for approval by the board.

...

(c) Upon receipt of a rent increase application, the department shall mail a notice to the affected tenants at the mobilehome spaces designated in the application, informing them of the receipt of such application, the amount of the requested rent increase, a brief summary of the owner's justification for the request, any supporting documents which may be inspected at the City Hall, the tenant's right to submit written statements, photographs or other documents relating to the application within thirty (30) days after the date the notice is mailed, and the address where such statements or documents may be mailed or delivered.

...

(e) A copy of each rent increase application shall be provided to each member of the board after such application is determined to be complete. The board shall hold a hearing on said application within sixty (60) days after such determination is made except as provided in subsec-

tion (i). Notice of the time, date, and place of the hearing shall be mailed to the applicant and the affected tenants at the mobilehome spaces designated in the application at least ten (10) days prior to the hearing.

(f) At the hearing, the applicant and the affected tenants may offer any testimony that is relevant to the requested rent increase. The applicant and affected tenants may offer documents, written declarations, or other written evidence for the first time at the hearing only if good cause is shown why such evidence was not filed with the department prior to the hearing. Formal rules of evidence shall not be applicable to such proceedings. [In most cases] . . . within fifteen (15) days after the close of the hearing, the board shall make its determination, pursuant to the standards established by subsection (g) of this section, approving or disapproving a rent increase for the mobilehome space or spaces specified in the rent increase application.

(g) The board shall approve such rent increase as it determines to be just, fair and reasonable. The board shall consider the following factors, in addition to any other factors it considers relevant, in making such determination:

(1) Changes in the Consumer Price Index for All Urban Consumers in San Diego Metropolitan Area published by the Bureau of Labor Statistics.

(2) The rent lawfully charged for comparable mobilehome spaces in the City of Escondido.

(3) The length of time since either the last hearing and final determination by the board on a rent increase application or the last rent increase if no previous rent increase application has been made.

(4) The completion of any capital improvements or rehabilitation work related to the mobilehome space or spaces specified in the rent increase application, and the cost thereof, including such items of cost, including materials, labor, construction interest, permit fees, and other items as the board deems appropriate.

(5) Changes in property taxes or other taxes related to the subject mobilehome park.

(6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located.

(7) Changes in the utility charges for the subject mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants.

(8) Changes in reasonable operating and maintenance expenses.

(9) The need for repairs caused by circumstances other than ordinary wear and tear.

(10) The amount and quality of services provided by the applicant to the affected tenant.

(11) Any existing written lease lawfully entered into between the applicant and the affected tenant.

. . .

(i) Notice of the board's determination shall be mailed to the applicant and all affected tenants at the mobilehome spaces designated in the application. The determination of the board shall be final.

COURT OF APPEAL

FOURTH APPELLATE DISTRICT, DIVISION ONE

JOHN K. YEE and IRENE S. YEE,
Appellants/plaintiffs,

vs.

CITY OF ESCONDIDO, etc., et al.,
Respondents/Defendants.

No. D010307

STIPULATION TO CONSOLIDATE APPEALS OF CASES PENDING BEFORE THIS COURT

LAW OFFICES OF
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Attorney for Plaintiffs,
John K. Yee and Irene S. Yee

TO: THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES, THE HONORABLE HOWARD WIENER, THE HONORABLE RICHARD D. HUFFMAN, AND THE HONORABLE DON R. WORK, COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE:

Currently pending before this Court is the above-captioned case, and the cases of *Mountain Shadows*

Mobilehome Estates v. City of Escondido, Appellate case No. D 010805, *Del Dios Mobilehome Estates v. City of Escondido,* No. D 011030, *Richard C. Kuebler dba Moonglow Mobilehome Park v. City of Escondido,* No. D 010942, *Casa de Amigos Mobilehome Estates v. City of Escondido,* No. D 010972, *Vista Verde Limited v. City of Escondido,* No. D 011011, *H.N. and Frances C. Berger Foundation v. City of Escondido,* No. D 010769 and *Mildred D. Tacey v. City of Escondido,* No. D 011115, all of these cases (with the exception of Yee) are currently consolidated in this Court under Case No. D 010769. The attorneys of record in these cases are Robert J. Jagiello & Associates, Robert J. Jagiello, for plaintiffs and appellants, and Endeman, Lincoln, Turek & Heater, Donald R. Lincoln, and the City Attorneys Office, David R. Chapman and Jeffrey Epp, for defendants and Respondents.

Also pending before this Court are the cases of *Escondido Mobileparks West v. City of Escondido,* Case No. D 011027, *Imperial Escondido Mobile Estates v. City of Escondido,* No. D 011026, *Glenn Charles Dejong v. City of Escondido,* No. D 011029 and *Robert Dolley v. City of Escondido,* No. D 011028. The attorneys of record for these four cases are Swanson & Dowdall, C. Brent Swanson, attorneys for plaintiffs and appellants, and Endeman, Lincoln, Turek & Heater, Donald R. Lincoln, and the City Attorneys Office, David R. Chapman and Jeffrey Epp, attorneys for defendants and respondents.

The parties to the above cases hereby agree, through their attorneys of record, that, as requested by Justices Weiner, Huffman, and Work on hearing oral argument in the case of *Yee v. City of Escondido,* on May 7, 1990, that all of the cases listed herein be consolidated for purposes of appeal and for rendering of a decision by this Court. The parties, through their attorneys of record, further

agree that these cases will be submitted for decision on the Briefs and oral argument in the *Yee* case.

IT IS SO STIPULATED.

Dated: May 11, 1990 ROBERT J. JAGIELLO
& ASSOCIATES

By /s/ Robert J. Jagiello
ROBERT J. JAGIELLO

Dated: May 16, 1990 SWANSON & DOWDALL

By /s/ C. Brent Swanson
C. BRENT SWANSON

Dated: May 14, 1990 ENDEMAN, LINCOLN,
TUREK & HEATER

By /s/ Donald R. Lincoln
DONALD R. LINCOLN

Dated: May 15, 1990 ESCONDIDO CITY
ATTORNEYS OFFICE

By /s/ Jeffrey Epp
JEFFREY EPP

IT IS SO ORDERED /s/ Kremer P.J.
KREMER P.J.

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN K. YEE and IRENE S. YEE,
Plaintiffs/Petitioners,
vs.
CITY OF ESCONDIDO, a Municipal corporation,
Defendants/Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court Rules 13.2 and 30)

(No Docket Number)

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TO: JUSTICE SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Title 28, United States Code, Section 2101(c) and Rule 13.2, Rules of the Supreme Court of the United States, application is hereby made for an extension of time within which to file a Petition for Writ of

Certiorari from April 24, 1991, to and including June 23, 1991.

1. The Order sought to be reviewed is that of the Supreme Court of the State of California in the case entitled *Yee v. City of Escondido,* SO 18568, reviewing the decision of the Fourth Appellate District, Division One, consolidated under Case No. D10307.

2. The denial of the Petition for Review was entered on January 24, 1991. The time allowed by law for filing the Petition for Writ of Certiorari will expire on April 24, 1991.

3. The denial of the Petition for Review, as well as the Opinion of the Court of Appeal, Fourth Appellate District, Division One, in the underlying case are appended hereto, marked as Exhibits "A" and "B" and by reference thereto, fully incorporated herein. The Appellate Court decision was reported at 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990) reviewed denied ____ Cal.3d ____ (1/24/91).

4. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257(3).

5. This case involves a claim by Petitioners that the rent control ordinance of the City of Escondido, as it applies to mobilehome parks, effects an unconstitutional taking of Petitioners' property. A taking was found to exist under precisely the same circumstances by the Ninth Circuit in the case of *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1987) *cert. den.,* 485 U.S. 940, 99 L.Ed.2d 1120, 1089 S.Ct. 1120 (1987), and the Third Circuit in the case of *Pinewood Estates of Michigan v. Barnegat Township Leveling Board,* 898 F.2d 347 (3rd Cir. 1990).

6. The Court of Appeal of the State of California for the State of California refused to follow the *Hall* and *Pinewood Estates* case, and instead, concluded that there was no taking under Article 1, Section 19 of the California Constitution, or under the Fifth Amendment. The decision of the California Court of Appeal is contrary to established federal appellate decisions cited immediately above.

7. This extension is requested for the following reasons:

(a) The original action was filed in State Court in order to comply with the requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108 (1985), wherein Petitioners must first resort to the State Courts in order to establish the Petitioners' claim is "ripe" for the adjudication by the Federal Court.

(b) The decision of the California Supreme Court and the California Court of Appeals establish that there is no state remedy in the State of California for precisely the kind of taking found to exist in both the *Hall* and *Pinewood* cases cited above.

(c) Petitioners then filed a motion to vacate the stay entered by the United States District Court, Southern District of California, in the case of *Yee v. City of Escondido,* Civil No. 89-0234-B. Said Stay was entered pursuant to a Motion for Abstention by the Respondent, City of Escondido, pending a resolution of the matter in the State Courts.

(d) On March 25, 1991, the United States District Court entered an Order Lifting Stay, and finding that the Petitioners have exhausted their State Court remedies as required by the *Williamson* case. (A copy of the

Order is appended hereto, marked Exhibit "C" and by reference thereto, fully incorporated herein).

(e) On or about March 22, 1991, Respondent, City of Escondido, filed a Motion for Reconsideration which is now set for hearing on April 29, 1991, a time that goes beyond that presently available for Petitioners to file their Petition for Writ of Certiorari in the Supreme Court of the United States.

(f) If the United States District Court reverses its decision lifting the Stay, the only available remedy will be by way of Petition for Writ of Certiorari before this Court.

(g) Critical federal constitutional rights arising under the Fifth Amendment are at issue in this litigation, the Courts of the State of California have refused to protect those constitutional rights despite the existence of compelling federal authority to the contrary, and Petitioners seek leave to extend the time within which to file the Petition for Writ of Certiorari as the last available avenue for a remedy in the event of reversal by the District Court of its Order Lifting Stay.

WHEREFORE, it is respectfully requested that the time within which a Petition for Writ of Certiorari herein be extended to and including June 23, 1991.

DATED: April 9, 1991

Respectfully submitted,

LAW OFFICES OF JAGIELLO
& PECH

By /s/ ROBERT J. JAGIELLO
ROBERT J. JAGIELLO
Attorneys for Petitioners

SUPREME COURT OF THE UNITED STATES

No. A-766

JOHN K. YEE AND IRENE S. YEE,
Petitioners,
vs.
CITY OF ESCONDIDO

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 24, 1991.

/s/ SANDRA DAY O'CONNOR
Associate Justice of the Supreme
Court of the United States

Dated this 11th
day of April, 1991.

Supreme Court, U.S.
FILED
JUL 18 1991
OFFICE OF THE CLERK

(3)

No. 90-1947

In The

Supreme Court of the United States

October Term, 1990

JOHN K. YEE, et al.,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

Petition for Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS JOHN K. YEE, ET AL.

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No. 90-1947

In The

Supreme Court of the United States

October Term, 1990

JOHN K. YEE, et al.,

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v.

THE CITY OF ESCONDIDO,

Respondent.

Petition for Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS JOHN K. YEE, ET AL.

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of

California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The present case involves an egregious violation of federal constitutional rights in the guise of local land use regulation. The opinion below upholds a mobile home rent control scheme that effectively transfers a fee interest from the owners of mobile home parks to the owners of

mobile home coaches situated in those parks. This regulatory wealth transfer is substantially identical to schemes struck down by two federal Circuit Courts as violating the Takings Clause. The ordinance also violates this Court's tests for regulatory takings by failing to substantially advance legitimate governmental interests and by depriving park owners of economically viable use of their property.

This amicus believes the opinion below places California state courts in direct conflict with federal case law on a question of federal constitutional rights. Moreover, the opinion below conflicts with this Court's decision in *Nollan* and other regulatory takings cases. If allowed to stand, the opinion below will constitute a serious setback for individual rights by undermining the constitutional prohibition against taking private property without just compensation.

STATEMENT OF THE CASE

Petitioners, owners of mobile home parks in the City of Escondido, brought an action in state court challenging, as a taking without compensation, the city's mobile home rent control ordinance. The ordinance, in concert with the state Mobilehome Residency Law (Cal. Civ. Code § 798, *et seq.*), gives well-behaved tenants a perpetual right to occupy their mobile home pads at below market rents. Someone buying a mobile home coach from a tenant in an Escondido park will acquire that same right.

Petitioners allege that the price of used mobile homes in Escondido has increased dramatically since passage of

the rent control ordinance. They allege that this increase is due entirely to the fact that existing tenants are able to monetize the value of perpetual occupancy of the owners' property at controlled rents. *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1352 (1990). Rather than let petitioners prove these allegations at trial, the trial court sustained the city's demurrer, without leave to amend, and dismissed the action. The California Court of Appeal affirmed, ruling that the complaint did not state a cause of action for an uncompensated taking under the Fifth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

In holding that petitioners have not stated a claim under the Takings Clause, the court below expressly rejects the contrary rulings of two federal Circuit Courts. *Yee v. City of Escondido*, 224 Cal. App. 3d at 1354-59. This creates a direct conflict between the federal courts and California state courts on a question of federal constitutional law.

Moreover, the holding below rejects the clear teaching of this Court. The regulation at issue in this case confiscates a marketable interest in real property from the owners of mobile home parks and transfers it to the owners of certain mobile homes. The relevant property interest—in effect, a servitude—is well within the mainstream of those recognized by this Court as qualifying for protection under the Takings Clause.

The servitude taken by the Escondido ordinance is a valuable commodity that is routinely bought and sold in

the open market. The fair market value of the servitude is measured by the resale premium commanded by mobile home coaches located in petitioners' mobile home parks, compared with identical coaches located on unregulated sites. *See* Hirsch and Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399 (1988).

The Escondido ordinance simply seizes this valuable commodity from petitioners and transfers it, without compensation, to third parties.

This Court has repeatedly held that regulations which confiscate a discrete, marketable property interest without compensation violate the Takings Clause of the Fifth Amendment. *E.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Hodel v. Irving*, 481 U.S. 704; *Nollan v. California Coastal Commission*, 483 U.S. 825. By any consistent application of this Court's precedent, the same conclusion must apply to the Escondido ordinance at issue in this case.

ARGUMENT

THE DECISION BELOW, IF ALLOWED TO STAND, WILL RESULT IN A TAKING OF PETITIONERS' PROPERTY WITHOUT JUST COMPENSATION

The Court of Appeal readily admitted that two federal Circuit Courts (the Ninth Circuit in *Hall v. City of Santa Barbara*, 797 F.2d 1493 (9th Cir. 1986) and the Third Circuit in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990)) would hold that these allegations *do* state a claim for a taking.

Yee v. City of Escondido, 224 Cal. App. 3d at 1354-59. But the Court of Appeal, noting that lower federal court decisions are not binding upon the state courts even on questions of federal law (*Rohr Aircraft Corp. v. County of San Diego*, 51 Cal. 2d 759, 764 (1959)), rejected the reasoning of the federal courts. *Yee*, 224 Cal. App. 3d at 1358-59 n.12. Thus a direct conflict now exists between the federal courts and the California state courts. Supreme Court Rule 10(b).

The federal courts in *Hall* and *Pinewood Estates* found that, when buyers are willing to pay a premium for a mobile home coach located on a rent-controlled pad, they are purchasing more than just the coach. Rather, they are acquiring a property interest—a type of servitude—in the site itself. The servitude entitles a coach owner to perpetually occupy the property of another without paying fair market rent.

This servitude represents a freely marketable interest in the real property of the park owner. The regulations at issue transfer this property interest to the owners of mobile home coaches occupying sites in the park. The federal courts concluded that this transfer of a freely marketable property interest comprises a *per se* taking, requiring just compensation under the Takings Clause.

The California Court of Appeal in *Yee* disagreed with this view. According to the Court of Appeal, "[t]he critical question is whether such a transfer can be justified by a rational governmental purpose," and whether the controlled rents are "fair and reasonable." *Yee*, 224 Cal. App. 3d at 1354.

This rejection of the per se rule is more than just a rejection of the reasoning of two federal courts, as claimed by the Court of Appeal. It is instead the rejection of a substantial body of United States Supreme Court precedent which is binding on state courts under the Supremacy Clause. U.S. Const. Art. VI, cl. 2.

There can be no doubt that the servitude transferred to the owners of mobile home coaches is a protected property interest under the Fifth Amendment. This Court has defined the interests subject to constitutional protection as all those rights inhering in an individual's relation to the thing owned, including the rights of possession, use, and disposal. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Protected property interests include not just fee interests and leaseholds, but "every sort of interest the citizen may possess." *Id.* Specific property interests that have been recognized by this Court under the Takings Clause have included the use of air space, *United States v. Causby*, 328 U.S. 256 (1946); flowage easements, *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961); liens, *Armstrong v. United States*, 364 U.S. 40 (1960); the right to exclude third parties, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and the right to exclude the general public, *Kaiser Aetna v. United States*, 444 U.S. 164. The freely marketable servitude confiscated by the Escondido ordinance falls well within the mainstream of property interests qualifying for constitutional protection.

In the absence of the regulations at issue, mobile home coach owners could have purchased a servitude from park owners guaranteeing them a perpetual coach site at below-market rents. The fair market value of the

servitude would have been determined through negotiation, and the park owner would have received this amount in exchange for his property interest. The Escondido ordinance in the case at bar, like the Santa Barbara ordinance in *Hall*, simply confiscates this servitude and transfers it to coach owners, without compensating petitioners for the loss of their property.

Similar issues have come before this Court. In *Kaiser Aetna v. United States*, 444 U.S. 164, for example, the federal government sued the owner of a pond which had been connected to the ocean by the owner's construction of a channel. The government sought a declaration that, by connecting the pond to the navigable waters of the United States, the public had obtained a servitude giving them "a right of access to what was once petitioners' private pond." *Id.* at 166. This Court held that the government's attempt to seize such a servitude "goes so far beyond ordinary regulation . . . as to amount to a taking." *Id.* at 178.

Again, in *Hodel v. Irving*, 481 U.S. 704, Congress attempted to transfer small common tenancy interests in land from the Indians who owned them to the tribe. *Id.* at 708-09. Likening the case to the attempted seizure of a servitude in *Kaiser Aetna*, this Court ruled that transferring even these small fractionalized interests amounted to an unconstitutional taking.

In *Nollan v. California Coastal Commission*, 483 U.S. 825, a state agency required a property owner to convey an easement as a condition to the issuance of a building permit. This Court first considered whether such a conveyance could be demanded by simple legislative fiat—

such as the Escondido ordinance in the case at bar. On that question, the *Nollan* Court held:

> "Had California simply required the Nollans to make an easement across their beachfront available to the public . . . rather than conditioning their permit . . . we have no doubt there would have been a taking." *Id.* at 831.

It should be noted that the property owners in *Nollan* already freely permitted people to traverse their beach. *Id.* at 858 (Brennan, J., dissenting). Nevertheless, the demand that they forfeit a property interest giving the public a formal right of occupancy was held to violate the Takings Clause. The same was true of *Hall* and, by any consistent application of precedent, the same is true of the case at bar. The Court of Appeal's observation that owners of mobile home parks are not forced to involuntarily accept the occupation of their property by third persons (*Yee*, 224 Cal. App. 3d at 1358) does nothing to distinguish these cases from the relevant line of Supreme Court precedent.

The court below hoped by that observation to portray *Hall* and its progeny as inconsistent with *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245 (1987). It should first be noted that *Florida Power* did not change the rule regarding per se takings. Both *Hodel v. Irving* and *Nollan* were decided after *Florida Power*. Further, *Florida Power* did not involve the outright confiscation and transfer of a property interest. If the cable companies who were the beneficiaries of regulation in *Florida Power* decided to remove their cables from petitioner's utility poles, they retained no rights in the poles to sell to other cable companies. In the instant case, the

City of Escondido slices away petitioners' property and gives it to others who can freely market it. This clearly goes far beyond mere regulation.

In contrast to the federal courts in *Hall* and *Pinewood Estates*, the court below failed to comprehend that the premium paid for coaches in rent-controlled parks represents the value of an interest in the park owner's property. The Court of Appeal asserts that this premium is paid for the coach itself, contending that coaches and pads are complementary goods like popcorn and popcorn poppers. *Yee*, 224 Cal. App. 3d at 1352-53.

As pointed out in the dissent, this reasoning illustrates the dangers of judges relying on their own lay opinions rather than allowing factual questions to go to trial. If there had been a trial, with real economists providing expert testimony (*see, e.g.*, Hirsch and Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399), the Court of Appeal might have learned that if mobile home pads and coaches were truly complementary goods, the price of new coaches would rise in the showroom when rent control is enacted. But this does not happen. Only those coaches already situated on pads in regulated mobile home parks command such a premium. The selling price of these mobile homes increases because they carry with them the value of the servitude confiscated by Escondido's regulation. Identical coaches outside rent controlled parks command no premium because their value does not include a servitude confiscated from park owners.

The facts alleged by petitioners show that an actual transfer of a property interest has occurred, an interest which coach owners can freely sell on the open market. The Court of Appeal's rejection of the per se taking rule, and its substitution of reasoning expressly rejected by the federal courts, is far more than a disagreement with two United States Circuit Courts of Appeals. It is a rejection of this Court's well-established precedent.

While there are times when California may be justified in departing from federal precedent in order to afford its citizens more constitutional protection than the federal courts have provided, that is not the case here. Here the California Court of Appeal is depriving California citizens of property rights recognized by the federal courts.

"The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause." *Hall*, 797 F.2d at 1498 (footnote omitted). By the plain language of the Fifth Amendment, the Escondido ordinance must be struck down as an unconstitutional taking without just compensation.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: July, 1991.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

JOHN K. YEE AND IRENE S. YEE, H.N.
and FRANCES C. BERGER FOUNDATION,
MOUNTAIN SHADOWS MOBILE HOME ESTATES,
RICHARD C. KUEBLER DBA MOONGLOW MOBILE HOME PARK,
CASA DE AMIGOS MOBILE HOME ESTATE, VISTA VERDE, LTD.,
IMPERIAL ESCONDIDO MOBILE ESTATES AND MILDRED D. TACEY,
Petitioners,

vs.

THE CITY OF ESCONDIDO,
Respondent.

**On Petition for a Writ of Certiorari
To The Fourth Appellate District,
Division One, Court of Appeal
For The State of California**

BRIEF AMICUS CURIAE OF THE CITY OF SAN JOSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND AFFIRMANCE

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**On Petition for a Writ of Certiorari
To The Fourth Appellate District,
Division One, Court of Appeal
For The State of California**

BRIEF AMICUS CURIAE OF THE CITY OF SAN JOSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND AFFIRMANCE

Pursuant to Supreme Court Rule No. 37.5, the City of San Jose, California, respectfully submits this brief amicus curiae in support of Petition for Writ of Certiorari and for affirmance of the judgment of the California Court of Appeal.

INTEREST OF AMICUS CURIAE

The City of San Jose is the third largest city in the State of California with approximately 780,000 residents. Like many other major cities throughout the country it has a serious shortage of housing, *Pennell v. City of San Jose*, 485 U.S. 1, 12, 108 S.Ct. 849, 99 L.Ed.2d 1, 14 (1988), and, in particular, a shortage of affordable housing for persons of low or moderate incomes. This housing crisis is particularly acute in California. See *Cotati Alliance for Better Housing v. City of Cotati*, 148 Cal.App.3d 280, 292-93 (1983).

In an effort to protect a portion of its low and moderate income households from excessive rents as a result of the housing shortage, the City of San Jose adopted a general housing rent control ordinance in 1979. In 1986, the City separated its mobilehome rent control regulations from the apartment rent control regulations. In adopting the mobilehome specific ordinance, the City held public hearings on the issue of controlling space rent upon the sale of mobilehomes, i.e. vacancy control. Ultimately, the City Council adopted the 1986 ordianance with a vacancy control provision. However, in direct response to the United States Court of Appeals decision by a panel of the Ninth Circuit in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), the City of San Jose amended its mobilehome rent control ordinance to include a vacancy decontrol provision in 1989. This was done by the City Council solely for purposes of avoiding or minimizing any potential liability as a result of the *Hall* decision. The San Jose City Council has consistently found vacancy control to be in the public interest.

Subsequent to the *Hall* decision, two published California appellate court decisions and at least one unpublished California appellate court decision have refused to follow the *Hall* decision.

Yee v. City of Escondido, 224 Cal.App.3d 1349 (1990),[1] *Casella v. City of Morgan Hill*, 230 Cal.App.3d 43, 280 Cal.Rptr. 876 (1991) and *Palomar Mobilehome Park Ass'n. v. City of San Marcos*, No. D011484, 4th Dist., Div. One.[2]

As a result of the inconsistent published opinions existing between the Ninth Circuit *Hall* decision and the two California appellate court decisions, *Yee* and *Casella*, there exists a serious conflict as to whether a mobilehome rent control ordinance in California without vacancy decontrol is a "taking".[3]

The San Jose City Council believes it would be in the public interest to amend its mobilehome rent control ordinance to delete the vacancy decontrol provision.[4] However, the serious conflict

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[1] The California Supreme Court denied review on January 24, 1991.

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[2] A Petition for Writ of Certiorari is currently pending before the United States Supreme Court in this matter. *Palomar Mobilehome Park Ass'n. v. City of San Marcos*, U.S. Supreme Court No. 90-1824. The City of San Jose alternatively strongly urges the Supreme Court to grant the Petition in the Palomar case on the same grounds herein set forth.

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[3] This conflict is highlighted in a recent Ninth Circuit decision. See *Sierra Lake Reserve v. City of Rocklin*,_____ F.2d_____ (9th Cir. 1991).

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[4] Public testimony before the San Jose Mobilehome Advisory Commission demonstrated substantial rent increases upon sale of the mobilehome since vacancy decontrol was initiated. On July 2, 1991, the San Jose City Council directed the San Jose City Attorney to draft an amendment to its mobilehome rent control ordinance to escrow such rent increases pending the United States Supreme Court's final determination of the "vacancy control" issue.

over the issue of whether a mobilehome rent control ordinance without a vacancy decontrol provision is a "taking", exposes the City to significant potential liability if it removes the provision.[5] The City respectfully urges the Supreme Court to grant the Petition for Writ of Certiorari in this case or in *Palomar*, *supra*, in order to clarify the need for a vacancy decontrol provision in a mobilehome rent control ordinance to avoid a finding that it is a "taking". Further, the City respectfully requests that after fully considering this matter, the Supreme Court find that vacancy control in a mobilehome rent control ordinance is not a "taking" but a permissible economic regulation and affirm the decision of the California court below.

THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

Supreme Court Rule 10(.1) provides in part as follows:

> A petition for writ of certiorari will be granted only when there are special and important reasons therefor.

Rule 10(.1)(b) contains the following example of a type of "special and important" reason which will be considered:

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or the United States Court of Appeals.

The matter presented in this petition fits squarely within this example. In *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 845 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), a Ninth Circuit panel relying upon *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), found that the allegations in the complaint that a mobilehome rent control ordinance without a

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[5] San Jose has approximately 60 mobilehome parks containing a total of more than 10,000 mobilehome spaces.

vacancy decontrol provision resulted in a "taking" sufficiently stated a claim for a taking by physical occupation. 833 F.2d at 1276.

The California Supreme Court has let stand opinions directly contrary to the *Hall* decision. Explicitly rejecting the Ninth Circuit decision in *Hall*, two published California appellate decisions and at least one unpublished California appellate decision have found no taking under circumstances very similar to *Hall*.

In addition to the case at bar, the California Court of Appeal, Sixth Appellate District, which is the district for the City of San Jose, published a decision in the case of *Casella v. City of Morgan Hill*, 230 Cal.App.3d 43, 280 Cal.Rptr. 876 (1991), involving the Morgan Hill mobilehome rent control ordinance. The ordinance, as amended in 1986, did not allow a rental increase when a mobilehome changed ownership but remained in the park. 230 Cal.App.3d at 46. Relying upon *Hall*, the mobilehome park owners alleged that the Morgan Hill mobilehome rent control ordinance, in combination with the California Mobilehome Residency Law (California Civil Code Section 798, *et seq.*) effected a transfer of property interests from the landlord to the tenant, tantamount to a physical taking of property. 230 Cal.App.3d at 50. California law prohibits evictions without good cause and requires a park owner to accept as a new tenant a person who purchases a mobilehome from an existing tenant unless the new tenant does not have the financial ability to pay or, based on past tenancies, has demonstrated that he or she will not comply with park rules and regulations. (California Civil Code Section 798.74.) The California Court of Appeal "repudiate[d] *Hall's* attempt to bootstrap a mobile home rent control ordinance — an economic regulation — to the Supreme Court's 'very narrow' holding in *Loretto*." 230 Cal.App.3d at 52. The Court found that the allegations of the complaint failed to state a cause of action for a taking under the federal Constitution and/or the state Constitution, and that the

ordinance is a permissible economic regulation. 230 Cal.App.3d at 56-57.

The Sixth District followed the State of California Court of Appeal, Fourth Appellate District, which on February 6, 1991, in the unpublished decision *Palomar Mobilehome Park Ass'n. v. City of San Marcos*, No. D011484, 4th Dist., Div. One, held that the San Marcos mobilehome park rent control ordinance, without a vacancy decontrol provision, was a permissible economic regulation and did not constitute a taking.[6]

Likewise, in the case at bar, the California Court of Appeal, Fourth District, in *Yee v. City of Escondido*, 224 Cal.App.3d 1349 (1990), correctly rejected the *Hall* rationale while holding that the mobilehome rent control ordinance with vacancy control of the City of Escondido, in combination with state law, did not result in a taking but was a permissible economic regulation.

The City of San Jose strongly believes that the California courts in *Casella*, *Palomar* and *Yee* have correctly determined that mobilehome rent control in California without a vacancy decontrol provision is a permissible economic regulation. The City Council desires to amend the City's ordinance to delete the vacancy decontrol provision which was added purely in response to the *Hall* decision.[7] However, as a result of the serious conflict which exists in California from the inconsistent decisions between the Ninth Circuit Court of Appeals and the California appellate courts, the City cannot determine whether mobilehome rent control without vacancy decontrol is a permissible economic regulation as it strongly believes, or an impermissible taking as determined in *Hall*.

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[6] See footnote 2, *supra*.

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[7] Mobilehome park residents, aware of the state court rulings, do not understand why the City cannot simply impose vacancy control.

Like the California state courts, the Connecticut Supreme Court has also found no "taking" when reviewing the validity of a state statute which guaranteed the mobilehome owner the right to sell the home on-site with limited exceptions. *Eamiello v. Liberty Mobile Home Sales*, 208 Conn. 620, 546 A.2d 805 (1988).

On the other hand, in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3rd Cir. 1990), a panel of the Third Circuit United States Court of Appeals reviewed a similar mobilehome park rent control ordinance which did not contain a vacancy decontrol provision. The Third Circuit panel agreed with *Hall* and found the allegations in the complaint alleged sufficient facts to support a finding that the ordinance, in conjunction with state law, provides for a permanent physical occupation constituting a taking without provision for compensation. 898 F.2d at 350. The *Pinewood* decision is flawed for the same reasons as the *Hall* decision.

The serious conflict between state court decisions and decisions of the United States Court of Appeals on this extremely important issue hamstrings the ability of California cities as well as cities throughout the country to regulate a matter of intense local concern.[8]

It is respectfully requested that the United States Supreme Court grant the Petition for Writ of Certiorari and, after a full review of these issues, affirm the decision of the California Court of Appeal.

THE CALIFORNIA APPELLATE DECISION WAS CORRECTLY DECIDED AND SHOULD BE AFFIRMED

In the case at bar, Yee, a mobilehome park owner, relying on *Hall v. City of Santa Barbara*, *supra*, asked the California Court

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[8] The conflict between the state and federal appellate courts is dramatized by a recent Ninth Circuit decision, *Sierra Lake Reserve v. City of Rocklin*, _____ F.2d _____ (9th Cir. 1991).

of Appeal, Fourth District, to reconsider an issue of constitutional law which had been reviewed six years before in *Oceanside Mobilehome Park Owners' Association v. City of Oceanside*, 157 Cal.App.3d 887 (1984). In the *Oceanside* case, the Court had rejected an argument made by the park owners that a rent control ordinance constituted a compensable "taking" because tenants were able to realize a premium on the sale of their mobilehomes in a rent controlled park compared with the price similar homes sold for in a non-rent controlled park. *Yee*, *supra*, 224 Cal.App.3d at 1351; *Oceanside*, 157 Cal.App.3d at 906-907.

The *Yee* Court fully considered the constitutional argument including full consideration of the *Hall* decision and its rationale. The Court found "*Hall's* reasoning unpersuasive and reaffirm[ed] the conclusion . . . reached in *Oceanside*." *Yee*, *supra*, 224 Cal.App.3d at 1351.

In *Yee*, the Court correctly found that the rent control ordinance was a permissible economic regulation. It specifically rejected *Hall's* conclusion that a rent control ordinance without vacancy decontrol is a taking by "physical occupation". *Yee*, *supra*, 224 Cal.App.3d at 1357-1358.

A. THE ESCONDIDO ORDINANCE IS PERMISSIBLE ECONOMIC REGULATION

The United States Supreme Court, recognizing that "the function of government may often be to tamper with free markets, correcting their failures and aiding their victims . . ." (*Fisher v. City of Berkeley*, 475 U.S. 260, 264, 106 S.Ct. 1045, 89 L.Ed.2d 206, 211 (1986)), has rendered decisions establishing that local governments may, consistent with their police power, adopt rent control ordinances where imperfections in the unregulated market for rental housing allow landlords to charge excessive rents. (See *Pennell v. City of San Jose*, 485 U.S. 1, 11-12, 108 S.Ct. 849, 99 L.Ed.2d 1, 13-15 (1988).) The United States Supreme Court has repeatedly reaffirmed that rent control ordinances are not per se takings for the purposes of the Fifth Amendment's requirement of just compensation. (*Id.* at 12, n. 6;

FCC v. Florida Power Corporation, 480 U.S. 245, 252, 107 S.Ct. 1107, 94 L.Ed.2d 282, 290 (1987).)

As noted by the *Yee* court:

> Mobilehomes and mobilehome park spaces are what economists refer to as complementary goods. Because they are used together, there is a direct and necessarily inverse relationship between the prices for complementary goods.
>
> . . .
>
> Where the price charged for a good or a service is excessively high due to monopoly or other unfair conditions, it necessarily follows that the price for complementary goods and services will be artificially low. Where a government regulation purports to reduce the excessive and unfair price to a reasonable level, the mere fact that the price for complementary goods and services rises as a result does not transmute an otherwise reasonable price regulation into a compensable "taking."

Yee, *supra*, 224 Cal.App.3d at 1352-1353.

A mobilehome rent control ordinance is an economic regulation intended to correct imperfections in the unregulated market by limiting the ability of landlords to charge excessive rents.[9] *See*, e.g. *Oceanside*, *supra*, 157 Cal.App.3d at 910-911. Because the ability to charge excessive rents is limited or eliminated by a mobilehome rent control ordinance, mobilehomes in a mobilehome park in a rent controlled jurisdiction will necessarily have increased value. *Yee*, *supra*, 224 Cal.App.3d at 1352-1353. The mobilehome park owner has lost some value because

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[9] California courts have recognized other purposes of mobilehome rent control, e.g., to facilitate and encourage fair bargaining between mobilehome owners and park owners. *Oceanside*, *supra*, 157 Cal.App.3d at 893.

he is no longer able to charge excessive rents, while at the same time the tenant's mobilehome has increased value because the rent for the space is limited to a fair and reasonable amount. *Id.* The critical question is not whether the mobilehome has increased in value but whether the controlled rents are fair and reasonable. *Casella*, *supra*, 230 Cal.App.3d at 56. The *Yee* Court correctly stated the following in this regard:

> Here, plaintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a "fair" rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no "taking."

Yee, *supra*, 224 Cal.App.3d at 1354.

As pointed out by the *Yee* Court, "[t]he fact that used mobilehomes in Escondido are selling for more than they have in the past is irrelevant." *Yee*, *supra*, 224 Cal.App.3d at 1354.

B. THE *HALL* COURT INCORRECTLY DETERMINED THAT A MOBILEHOME RENT CONTROL ORDINANCE WITHOUT VACANCY DECONTROL IS A TAKING BY PHYSICAL OCCUPATION

In *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), a Ninth Circuit panel reviewed a mobilehome rent control ordinance adopted by the City of Santa Barbara in August 1984. The Santa Barbara ordinance also did not contain a vacancy decontrol provision. The Ninth Circuit panel reviewed both "regulatory taking cases" (e.g. *Penn Central Transporation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *rehearing denied*, 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978)) as well as "physical occupation cases" (e.g. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)). The panel concluded that "[w]hen viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical

occupation...." *Hall*, *supra*, at 1276. In reaching this conclusion the Court relied principally upon *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).[10]

For the reasons stated by the *Yee* Court, *supra*, and the *Casella* Court, *supra*, the Supreme Court should find that Hall was incorrectly decided and should be overruled.

1. The Mobilehome Rent Control Ordinance Is Not A Taking By Physical Occupation

The rent control ordinance here is not a "physical occupation" under the *Loretto*, *supra*, decision. In *Loretto*, a New York law made it *mandatory* for landlords to permit a cable television company to install its facilities on their property. In direct contrast, in *Yee*, the right to occupy a particular space within a mobilehome park is originally obtained "consensually".[11] The park owner voluntarily chooses to rent his or her space to mobilehome owners. *Yee*, *supra*, 224 Cal.App.3d at 1358. Therefore, the landlord voluntarily transfers a "possessory interest" in property to the mobilehome owners in exchange for rents. *Yee*, *supra*, 224 Cal.App.3d at 1354, 1358.

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[10] *Hall* was decided before the United States Supreme Court rendered its decision in *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 2081 (1988). The *Hall* Court indicated a general concern about the legitimacy of rent control. *Hall*, *supra*, 833 F.2d 1281, note 26. The *Pennell* decision clarified that rent control is not a "per se" taking and advances legitimate public purposes. (See *Pennell*, *Id.* at 12-13 n. 6.)

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[11] This is also a critical distinction in view of the decision in *FCC v. Florida Power*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), discussed *infra*.

To the extent that mobilehome owners obtain any "permanent occupancy" rights, such rights are derived from the state Mobilehome Residency Law which was enacted unrelated to mobilehome rent control regulations and has been in place since 1978.[12] The state law is similar to common law provisions that a landlord may not unreasonably withhold consent to the assignment of a lease. (See e.g. *Kendall v. Ernest Pestana, Inc.*, 40 Cal.3d 488 (1985).)

The *Loretto* Court specifically noted the following with respect to the effect of its holding on landlord-tenant relationships:

> Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This court has consistently affirmed that states have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.
>
> *Loretto*, *supra*, 458 U.S. at 440, 73 L.Ed.2d at 885.

The Escondido rent control ordinance does not give rise to a "physical occupation" as described in *Loretto* but is an exercise of reasonable regulatory power.[13]

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[12] California Mobilehome Residency Law was adopted by California Statutes 1978 ch. 1031 §1.

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[13] Indeed, it is no more a forced "physical occupation" than apartment rent control ordinances which have vacancy control provisions. See *Fisher v. City of Berkeley*, 37 Cal.3d 644 (1984), *app. dism.*, 471 U.S. 1124, 105 S.Ct. 2653, 86 L.Ed.2d 270 (1985).

2. The *Hall* Court Incorrectly Focused On The Tenants' Ability To Sell Mobilehomes For A Higher Amount Due To The Rent Control Ordinance

The *Hall* Court found it "crucial" that the existing tenant has the ability to "monetize" future rent control savings and recapture them from later tenants when the mobilehome is sold. *Hall*, *supra*, 833 F.2d at 1279. The California Court of Appeal in *Casella v. City of Morgan Hill*, *supra*, correctly found this "crucial" assertion to be nothing more than the necessary consequences of economic controls on the mobilehome housing market. As the Court stated:

> What *Hall* found crucial, we regard as a truism; an inevitable part of the unique relationship between a mobilehome park owner and his or her tenant. The park owner has an equity interest in the park land; the tenant in his or her coach.
>
> . . .
>
> Like others, we question *Hall's* failure to explain why a tenant's ability to reap an economic benefit from rent control is crucial to a resolution of the constitutional question. As Justice Weiner points out in *Yee*, mobilehome rent control, which arguably benefits only the tenant in place at the time it is enacted, does not differ conceptually from other rent control, which benefits all succeeding tenants equally: "If an owner's property has been taken by the government, it should be of no constitutional consequence to whom the property has been given. . . . In both cases . . . the value 'taken' from the property owner is conceptually identical." (*Yee v. Escondido*, *supra*, 224 Cal.App.3d at 1356, footnote omitted.)

Casella, *supra*, 230 Cal.App.3d at 53-54.

Furthermore, as the *Yee* Court, the *Casella* Court and others have pointed out, any increase in the sales prices of mobilehomes

resulting from rent control may simply reflect the artificially low price caused by excessive rents charged prior to its enactment.[14]

Increased value to the mobilehome as a necessary indirect consequence of rent control is irrelevant to the determination of whether a taking has occurred.

3. *FCC v. Florida Power Corp.* Demonstrates That The *Hall* Rationale Is Flawed

The United States Supreme Court decided *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), after the *Hall* decision. In that case, the Court dismissed the contention by a utility company that a federal statute which authorized the FCC to determine the rates which they could charge cable television companies for the attachment of cable television equipment on their poles constituted a "taking". The Eleventh Circuit Court of Appeals found that the reduction in the amount that could be charged to the cable television companies resulted in a taking by "physical occupation". *FCC*, 480 U.S. at 250, 94 L.Ed.2d at 289.

The Supreme Court noted that unlike *Loretto*, *supra*, the public utility landlords had voluntarily entered into the leases with cable company tenants. The Court stated the following in this regard:

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[14] See Berger, *Home Is Where The Heart Is: A Brief Reply To Professor Epstein*, 54 Brooklyn Law Review 1239. Professor Berger points out, "[t]he burden may seem somewhat harsher for those who are owners when rent regulation is first installed, but the usual prelude to government control of rents or condominium conversions is a housing shortage which allows landlords to charge high economic rents or enter the sales market. To be thwarted from exploiting a housing shortage may disappoint such owners, but commercial frustration, in the circumstances, hardly seems unjust." *Id.* at 1246.

> Appellees contend, in essence, that it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it is the *invitation*, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.

FCC, 480 U.S. at 252-253, 94 L.Ed.2d at 290 (emphasis added).

The Supreme Court specifically noted that it "characterized [its] holding in *Loretto* as 'very narrow'." *FCC*, 480 U.S. at 251, 94 L.Ed.2d at 289. The Court also stated the following: "As we observed in *Loretto*, statutes regulating the economic relations of landlords and tenants are not per se takings." *FCC*, 480 U.S. at 252, 94 L.Ed.2d at 290.

Similarly here, the mobilehome park owners voluntarily permit occupation of their spaces. The *FCC* case clearly discloses that the Supreme Court did not intend the *Loretto* "physical occupation" analysis to apply to ordinary landlord-tenant regulations.

CONCLUSION

Urban housing shortages and high rents present a serious problem. Mobilehome rent control ordinances, with vacancy control, are economic regulations seeking to protect present and future mobilehome owners from excessive rents while at the same time provide the mobilehome park owners a fair and reasonable return. A serious conflict exists between California state court decisions and a decision in the Ninth Circuit United States Court of Appeals on this issue of significant importance to many cities throughout California and the rest of the nation.

For the reasons stated herein, amicus, City of San Jose, urges the United States Supreme Court to grant the Petition for Writ of Certiorari and affirm the judgment of the California Court of Appeal.

Dated: July 19, 1991

Respectfully submitted,

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Counsel of Record

Supreme Court
FILED
NOV 27 1991
OFFICE OF THE CLERK

ORIGINAL
No. 90-1947

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE,
H.N. and FRANCES C. BERGER FOUNDATION,
MOUNTAIN SHADOWS MOBILE HOME ESTATES,
RICHARD C. KUEBLER, dba MOONGLOW MOBILE
HOME PARK, CASA DE AMIGOS MOBILE HOME
ESTATE, VISTA VERDE, LTD., IMPERIAL
ESCONDIDO MOBILE ESTATES, and
MILDRED D. TACEY,
Petitioners,
VS.
THE CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

JOINT APPENDIX

PETITION FOR CERTIORARI FILED JUNE 19, 1991
CERTIORARI GRANTED OCTOBER 15, 1991

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RELEVANT CASE EVENTS

Date	Proceedings
12/01/88	Complaint filed; Summons issued.
01/03/89	Defendant's Motion to Strike and Accompanying Memorandum of Points and Authorities filed.
01/03/89	Defendant's Demurrer to Plaintiff's Complaint and Accompanying Memorandum of Points and Authorities filed.
01/18/89	Plaintiff's Points and Authorities in Opposition to Demurrer filed.
01/26/89	Defendant's Reply Memorandum in Support of Demurrer filed.
01/31/89	Minute Order on Defendant's Motion to Strike and Demurrer to Plaintiff's Complaint.
02/10/89	Oral Argument in San Diego Superior Court.
02/10/89	Minute Order Modified After Oral Argument.
03/30/89	Order Granting Motion to Strike; Sustaining Demurrer Without Leave to Amend; Dismissing Entire Action as to All Parties filed.
04/05/89	Notice of Signing of Order filed.
04/12/89	Defendant's Proof of Service for Notice of Signing of Order filed.
06/08/89	Plaintiffs' Notice of Appeal filed.
10/05/89	Appellants' Opening Brief filed in the Fourth Appellate District, Division One, California Court of Appeals.
11/14/89	Respondent's Brief filed.

RELEVANT CASE EVENTS

Date	Proceedings
12/01/89	Appellants' Reply Brief filed.
05/07/90	Oral Argument before the Fourth Appellate District, Division One, California Court of Appeals.
10/31/90	Decision of the Fourth Appellate District, Division One, California Court of Appeals filed.
11/13/90	Petition for Review of Decision of Court of Appeals (plaintiffs') filed in the California Supreme Court.
12/21/90	Answer to Petition for Review (defendant's) filed in the California Supreme Court.
01/24/91	Order of the California Supreme Court Denying Petition filed.

No. 90-1947

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE,
H.N. and FRANCES C. BERGER FOUNDATION,
MOUNTAIN SHADOWS MOBILE HOME ESTATES,
RICHARD C. KUEBLER, dba MOONGLOW MOBILE HOME PARK, CASA DE AMIGOS MOBILE HOME ESTATE, VISTA VERDE, LTD., IMPERIAL ESCONDIDO MOBILE ESTATES, and
MILDRED D. TACEY,
Petitioners,
VS.
THE CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

JOINT APPENDIX

PETITION FOR CERTIORARI FILED JUNE 19, 1991
CERTIORARI GRANTED OCTOBER 15, 1991

IN THE
SUPERIOR COURT OF THE
STATE OF CALIFORNIA
CITY OF SAN DIEGO

COMPLAINT IN INVERSE CONDEMNATION, FOR DECLARATORY RELIEF, DAMAGES FOR VIOLATION OF CONSTITUTIONAL & CIVIL RIGHTS, (CAL. CONSTITUTION, ARTICLE I § 19, FEDERAL CONSTITUTION 5TH & 14TH AMENDMENTS, 18 U.S.C. §§ 1981, 1982, 1983 & 1988)

COME NOW PLAINTIFFS JOHN K. YEE AND IRENE S. YEE, PLAINTIFFS, and hereby allege the following:

1. Defendant, CITY OF ESCONDIDO, is a public entity organized and existing under the laws of the State of California.

2. Plaintiffs are unaware of the true names and capacities of defendants sued herein as DOES 1 through 10, inclusive, and therefore sue these defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. Plaintiffs are informed and believe and thereon allege that each of said fictitiously named defendants is in some manner responsible for the injury and damages to plaintiffs alleged herein.

3. Plaintiffs are informed and believe and thereon allege that at all times herein mentioned defendants DOES 1, through 10 were the agents, servants, and employees of their codefendants and in doing the things hereinafter mentioned were acting within the course and scope of their authority as such agents, servants and

employees with the permission and consent of their codefendants.

4. On June, 1988, and at all times herein mentioned, plaintiffs were the owners of that certain real property known as Friendly Hills and Sunset Terrace Mobile Home Parks ("The Park") within the City of Escondido. The Park contains 159 spaces rented for occupancy by mobilehomes used by the owners of such mobilehomes for residential purposes.

5. On or about June, 1988, the CITY OF ESCONDIDO, after employment of the initiative process, adopted an ordinance establishing mobilehome rent protection (a copy of the proposed ordinance is attached hereto, marked *Exhibit A*, and by reference thereto fully incorporated herein); and amended said ordinance by *Ordinance Number 88-50* (a copy of which ordinance is attached hereto, marked *Exhibit B*, and by reference thereto fully incorporated herein). The CITY OF ESCONDIDO, through its agents, employees and personnel, is enforcing the provisions of the rent control law.

6. The rent control law has had the effect of depriving the plaintiffs of all use and occupancy of its real property and granting to the tenants of mobilehomes presently in The Park, as well as the successors in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiff. Plaintiffs have no legal right to receive any compensation for the rights now enjoyed by the tenants of The Park other than the stream of income from rents as regulated by the Rent Control Law.

7. The tenants of the Park have the power and ability, and have used that power and ability on many occasions, to sell the rights of use and occupancy of plaintiffs' real

property at reduced rentals, which have been transferred to said tenants by operation and enforcement of the Rent Control Law, to other parties without the consent of plaintiffs and to receive consideration from such other parties for the transfer of such rights.

8. The consideration for which the tenants of the Park can, and do, transfer the ownership of individual coaches is substantially in excess of the value of those coaches and the excess consideration over the value of the coaches is due to the rights of permanent physical occupation at a fixed reduced rent which have been transferred to the tenants of the Park by the operation and enforcement of the Rent Control Law.

9. The tenants of the Park have no obligation to account to Plaintiff for the proceeds of the sale of the rights which have been transferred to the tenants of the Park by the operation and enforcement of the Rent Control Law.

10. The operation and enforcement of the Rent Control Law effects a taking of plaintiff's property for public use and benefit without payment of just compensation in violation of Article 1, § 19 of the California Constitution and the Fifth and Fourteenth Amendments of the United States Constitution and a deprivation of civil rights under color of law in violation of 42 U.S.C. §§ 1981 and 1983.

11. The enforcement of the Rent Control Law by the CITY OF ESCONDIDO constitutes a taking of property by said defendant for private purposes in violation of Article 1, § 19 of the California Constitution and the 5th and 14th Amendments to the United States Constitution, and a deprivation of civil rights under the color of law in violation of 42 U.S.C. 1981 and 1983.

12. As a direct and proximate result of the operation and enforcement of the Rent Control Law by defendant,

plaintiffs have suffered damages in the amount of Six Million Dollars ($6,000,000.00).

13. Plaintiffs have received no compensation for the damage to plaintiffs' property.

14. Plaintiffs have incurred and will incur attorneys fees, expert witness fees in the nature of appraisal, in amounts that cannot be ascertained, but which are recoverable in this action under the provisions of § 1036 of the Code of Civil Procedure, and under provision of 42 U.S.C. §§ 1981, 1983 and 1988.

SECOND CAUSE OF ACTION

15. Plaintiffs incorporate herein by reference all of the allegations contained in ¶¶ 1 through 14 hereof as though fully set forth.

16. The Rent Control Law is constitutionally infirm in that no emergency exists which justifies its imposition on plaintiff, and, therefore, continued enforcement thereof violates Article I, § 19 of the California Constitution and the 5th and 14th Amendments of the United States Constitution, and a deprivation of civil rights under color of law in violation of 42 U.S.C. §§ 1981 and 1983.

WHEREFORE, Plaintiffs pray judgment against defendants as follows:

1. For damages in the amount of Six Million Dollars ($6,000,000.00);

2. For declaration that the Rent Control Law is unconstitutional, invalid and unenforceable and that none of the parties hereto have any right, duty or obligation to comply with the terms and provisions thereof;

3. For a permanent injunction enjoining defendant, its agents, employees and all those acting by, through, for, on behalf of, or in concert with defendant, or pursuant to any of the provisions of the ordinance, from authorizing or engaging in, directly or indirectly, the enforcement of the ordinance;

4. For reasonable attorney's, appraisal, and other expert fees according to proof;

5. For costs of suit incurred herein; and,

6. For such other and further relief as the court deems proper.

Dated: December 1, 1988

EXHIBIT A TO COMPLAINT

PROPOSITION K

K. Shall the people of the City of Escondido approve the following: The people of the City of Escondido, California, do ordain as follows:

An Ordinance of the City of Escondido Establishing Mobilehome Rent Protection.

A measure establishing mobilehome rent control in the City of Escondido, providing as a base rent the rent in effect on January 1, 1986; establishing the Escondido City Council as a Mobilehome Park Rental Review Board; creating procedures and limitations for permitted rent increases; regulating terminations of tenancies; and giving certain remedies and defenses to mobilehome park tenants in the event of violations of this Ordinance?

PROPOSED ORDINANCE

AN ORDINANCE OF THE CITY OF ESCONDIDO ESTABLISHING MOBILEHOME RENT PROTECTION

1. *Definitions.* For the purposes of this ordinance, the following words, terms, and phrases shall be defined as follows: (a) Board shall mean the Mobilehome Park Rental Review Board of the City of Escondido. (b) Capital improvement shall mean the installation of new improvements and facilities and/or the replacement or reconstruction of existing improvements and facilities which consist of more than ordinary maintenance and/or repairs. (c) Department shall mean the Community Development Department of the City of Escondido. (d) Mobilehome shall mean a vehicle designed and equipped for human habitation and which is used as the principal place of habitation for the occupants thereof.

(e) Mobilehome park shall mean any area of land within the City of Escondido where two (2) or more mobilehome spaces are rented, or held out for rent, to accommodate mobilehomes used for human habitation. (f) Mobilehome space shall mean the site within a mobilehome park intended, designed, or used for the location or accommodation of a mobilehome and any accessory structures or appurtenances attached thereto or used in conjunction therewith. (g) Owner shall mean the owner or operator of a mobilehome park or an agent or representative authorized to act on said owner's or operator's behalf in connection with the maintenance or operation of such park. (h) Rehabilitation work shall mean any renovation or repair work completed on or in a mobilehome park which was performed in order to comply with the direction or order of a public agency, or to repair damage resulting from fire, earthquake, or other casualty. (i) Rent shall mean the consideration paid for the use or occupancy of a mobilehome space. (j) Rental increase shall mean any increase in rent charged by an owner to a tenant, including but not limited to lease offers, lease renewal offers, and increase in monthly rents. (k) Tenancy shall mean the right of a tenant to use or occupy a mobilehome space. (l) Tenant shall mean a person who has a tenancy in a mobilehome park.

2. *The Mobilehome Park Rental Review Board.* (a) The City Council of the City of Escondido shall serve as the Mobilehome Park Rental Review Board. (b) The Board shall establish the time of any hearings or meetings held pursuant to this Ordinance and such hearings or meetings shall be held in the City Hall as often as the Board determines to be necessary to discharge its duties hereunder. (c) Three (3) members shall constitute a quorum for the purpose of conducting a hearing or meeting. Decisions of the Board shall be made by a majority vote of the

members present. (d) The duties and responsibilities of the Board shall include the hearing of all rent increase applications and determine either to approve or disapprove a rent increase in the manner provided for herein.

3. *Base Rent.* Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986. If a previously rented mobilehome space was not rented on January 1, 1986, the owner shall not demand, accept, or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to January 1, 1986. If a mobilehome space is rented for the first time after January 1, 1986, the owner shall not demand, accept, or retain rent for said space exceeding the rent first charged for the space. No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board. Except as herein provided, an owner shall not demand, accept or retain rent exceeding the rent in effect on January 1, 1986, for a mobilehome space that was not regulated by this section prior to January 1, 1986. If such mobilehome space was not rented on January 1, 1986, the owner shall not demand, accept or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to January 1, 1986.

4. *Permitted Rent Increases Based Upon an Application Approved by the Board.* (a) An owner may file with the Department a rent increase application for one or more mobilehome spaces for approval by the Board. (b) An application for a rent increase pursuant to this section shall be filed upon a form prescribed by the Department and shall be accompanied by the payment of a fee which will be determined by the Board; provided, however, that

no fee shall be charged for applications filed within the first one hundred eighty (180) days after the effective date of this Ordinance. Said application shall specify the address of the mobilehome park, the space number or numbers for which rent is requested to be increased, the amount of the requested rent increase, and the facts supporting the requested increase. The applicant shall produce at the request of the Department any records, receipts, reports, or other documents that the Department may deem necessary for the Board to make a determination whether to approve a rent increase. The application shall be made under penalty of perjury and supporting documents shall be certified or verified as requested by the Department. (c) Upon receipt of a rent increase application, the Department shall mail a notice to the affected tenants at the mobilehome spaces designated in the application, informing them of the receipt of such application, the amount of the requested rent increase, a brief summary of the owner's justification for the request, any supporting documents which may be inspected at the City Hall, the tenant's right to submit written statements, photographs or other documents relating to the application within thirty (30) days after the date the notice is mailed, and the address where such statements or documents may be mailed or delivered. (d) The Department shall determine within thirty (30) days after receipt of a rent increase application whether said application is complete. If the Department determines that said application is not complete, it shall notify the applicant in writing as to what additional information is required. (e) A copy of each rent increase application shall be provided to each member of the Board after such application is determined to be complete. The Board shall hold a hearing on said application within sixty (60) days after such determination is made except as provided in

subsection (i). Notice of the time, date, and place of the hearing shall be mailed to the applicant and the affected tenants at the mobilehome spaces designated in the application at least ten (10) days prior to the hearing. (f) At the hearing, the applicant and the affected tenants may offer any testimony that is relevant to the requested rent increase. The applicant and affected tenants may offer documents, written declarations, or other written evidence for the first time at the hearing only if good cause is shown why such evidence was not filed with the Department prior to the hearing. Formal rules of evidence shall not be applicable to such proceedings. Except as provided in subsection (j), within fifteen (15) days after the close of the hearing, the Board shall make its determination, pursuant to the standards established by subsection (g) of this section, approving or disapproving a rent increase for the mobilehome space or spaces specified in the rent increase application. (g) The Board shall approve such rent increase as it determines to be just, fair and reasonable. The Board shall consider the following factors, in addition to any other factors it considers relevant, in making such determination: (1) Changes in the Consumer Price Index for All Urban Consumers in the San Diego Metropolitan Area published by the Bureau of Labor Statistics. (2) The rent lawfully charged for comparable mobilehome spaces in the City of Escondido. (3) The length of time since the last hearing and final determination by the Board on a rent increase application or the last rent increase if no previous rent increase application has been made. (4) The completion of any capital improvements or rehabilitation work related to the mobilehome space or spaces specified in the rent increase application, and the cost thereof, including such items of cost, including materials, labor, construction interest, permit fees, and other items as the Board

deems appropriate. (5) Changes in property taxes or other taxes related to the subject mobilehome park. (6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located. (7) Changes in the utility charges for the subject mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants. (8) Changes in reasonable operating and maintenance expenses. (9) The need for repairs caused by circumstances other than ordinary wear and tear. (10) The amount and quality of services provided by the applicant to the affected tenant. (11) Any existing written lease lawfully entered into between the applicant and the affected tenant. (h) The Board may provide that an increase in rent or a portion of an increase in rent granted by the Board be limited to the length of time necessary to allow the park owner to reasonably amortize the cost of a capital improvement, including interest. Such increase granted as a result of the capital improvement shall not continue beyond the time necessary for reasonable amortization of the cost of such improvement. (i) Notice of the Board's determination shall be mailed to the applicant and all affected tenants at the mobilehome spaces designated in the application. The determination of the Board shall be final. (j) In the event that the Board is unable to act and make its final determination on a completed rent increase application within the time limitations prescribed by subsection (d)-(f) of this Section, and after the thirty (30) days for the tenant to file statements or documents in opposition to the application under subsection (c) shall have expired, the Board may approve such interim rent increases for the mobilehome space or spaces specified in said application which clearly appears to be warranted when the factors set forth in subsection (g) of this Section are considered, based upon the facts stated in the

application, any written statements or documents filed with the Department by the affected tenants, and any other facts known to the Board. An approved interim rent increase shall expire on either (1) the last day of the month within which the Board makes its final determination disapproving a rent increase, or (2) the effective date of a rent increase which is approved by a final determination of the Board. (k) The time within which the Board may conduct a hearing as provided in subsection (e) or make its determination as provided in subsection (f) may be extended twice by the Board for periods of time not to exceed sixty (60) days each if the Board approves an interim rent increase pursuant to subsection (j).

5. *Fees.* A tenant whose tenancy is not regulated by the provisions of the Mobilehome Residency Law shall not be charged a fee for anything other than rent or utilities with the exception of incidental reasonable charges for services actually rendered.

6. *Permissible Reasons for Terminating or Refusing to Renew a Tenancy.* (a) A tenancy which is not subject to the provisions of the Mobilehome Residency Law shall not be terminated nor shall its renewal be refused, except for one or more of the following reasons: (1) Failure of the tenant to comply with a local ordinance of State law or regulation relating to mobilehomes within a reasonable time after the tenant receives a notice of noncompliance from the appropriate governmental agency. (2) Conduct by the tenant, upon the mobilehome park premises, which constitutes a substantial annoyance to other tenants. (3) Failure of the tenant to comply with reasonable rule or regulation of the mobilehome park. No act or omission of the tenant shall constitute such failure to comply unless and until the owner has given the tenant written notice of the alleged rule or regulation violation and the

tenant has failed to adhere to the rule or regulation within seven (7) days. (4) Nonpayment of rent, utility charges, or reasonable incidental service charges. (5) Condemnation of the mobilehome park. (6) Change of Use of the Mobilehome Park, provided that the provisions of Subsection (f) of Section 798.56 of the California Civil Code are followed. (A) The owner gives the tenant written notice of the proposed change twelve (12) months or more before the date of the proposed change. (B) The owner gives each proposed tenant whose tenancy will commence within twelve (12) months of the proposed change written notice thereof prior to the inception of his tenancy. (b) Notice of termination or refusal to renew must be given in writing in the manner prescribed by Section 1162 of the Code of Civil Procedure at least sixty (60) days prior to the termination date of the tenancy. Said notice shall state the date the tenancy terminates, the reason for the termination or refusal to renew, and the specific facts upon which the owner is relying.

7. *Refusal of Tenant to Pay Illegal Rent.* A tenant may refuse to pay any rent in excess of the maximum rent permitted by this Ordinance. The fact that such unpaid rent is in excess of the maximum rent shall be a defense in any action brought to recover possession of a mobilehome space for nonpayment of rent or to collect the illegal rent.

8. *Remedies.* (a) Any person who demands, accepts, or retains any payment of rent in violation of the provisions of this Ordinance shall be liable in a civil action to the person from whom such payment is demanded, accepted or retained for damages in the sum of three (3) times the amount by which the payment or payments demanded, accepted, or retained exceed the maximum rent which could be lawfully demanded, accepted, or retained together with reasonable attorney's fees and costs as determined by the Court. (b) Any person violating any of the provisions of this Ordinance shall be guilty of a misdemeanor and shall be punishable in the manner provided by Section 1-13 of the Escondido Municipal Code.

9. *Severability.* If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and an independent provision and such decision shall not affect the validity of the remaining portion thereof.

EXHIBIT B TO COMPLAINT

ORDINANCE NO. 88-50

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ESCONDIDO, CLARIFYING THE MOBILE HOME RENT PROTECTION ORDINANCE CONCERNING THE TREATMENT OF LONG TERM LEASES AFFECTING CURRENT AND NEW TENANTS

The City Council of the City of Escondido, California, in order to clarify the Ordinance of the City of Escondido Establishing Mobilehome Rent Protection, DOES HEREBY ORDAIN as follows:

SECTION 1. *Paragraph 1(j)* of that ordinance is amended to read as follows:

"Tenant" shall mean not only a person who has an existing tenancy in a mobilehome park but also a person who has purchased or is in the process of purchasing or otherwise acquiring a mobilehome that will remain at that particular park.

SECTION 2. A new paragraph 6 is inserted in that Ordinance to read as follows:

6. Long term Leases.

(a) Before any rental agreement or lease in excess of 12 months is offered to any tenant it must first be submitted to the Board for review to determine if it complies with the terms of this ordinance. It shall not be offered to the tenant until the proposed lease or rental agreement has been approved by the Board.

(b) Before any rental agreement or lease in excess of 12 months is executed by the tenant the owner must

(1) offer the tenant the option of a rental agreement for a term of 12 months or less, (2) provide the tenant with a copy of the City of Escondido Ordinance Establishing Mobilehome Rent Protection, as amended to that date, and (3) inform the tenant both orally and in writing that if the tenant signs a lease or rental agreement with a term in excess of 12 months the lease or rental agreement may not be subject to the terms and protections of the Escondido Mobilehome Rent Protection Ordinance.

(c) A lease or rental agreement in excess of 12 months executed by a tenant shall not be exempt from the Escondido Mobilehome Rent Protection Ordinance unless it complies with each and every requirement in Civil Code Section 798.17 (a)-(c) for exemption for such leases or rental agreements offered to "homeowners."

SECTION 3. Former paragraphs 6, 7, 8, and 9 of that Ordinance are renumbered as paragraphs 7, 8, 9, and 10.

SECTION 4. This ordinance shall take effect immediately after the date of its adoption.

SECTION 5. *Separability.* If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

SECTION 6. That all ordinances, or parts of ordinances, in conflict herewith are hereby repealed.

SECTION 7. That the City Clerk is hereby directed to certify to the passage of this ordinance and to cause the same or a summary to be published one time within

15 days of its passage in the Times Advocate, a newspaper of general circulation, printed and published in the City of Escondido.

DECLARATION OF URGENCY

Certain park owners are informing prospective mobilehome purchasers that the purchaser must sign a long term lease as a condition of the park owner's approval of the sale. As a result purchasers and prospective purchasers of mobilehomes in Escondido could be denied the benefits of the Rent Protection Ordinance. In addition the actions of these park owners are causing substantial hardships to current mobilehome owners. Some current mobilehome owners have jobs waiting for them out of state, and escrows on other residences that are about to close but the actions of these park owners have discouraged and frustrated sales of their mobilehomes. Other current homeowners, particularly those who are elderly, are very concerned and worried that if a long term lease is required that they also will be unable to sell their mobilehomes. This situation has the potential to cause, if it has not already caused, adverse effects on the health and welfare of Escondido citizens. Therefore, in order to prevent any additional hardships and adverse affects on the health and welfare of Escondido citizens it is necessary to immediately clarify the fact that the Rent Protection Ordinance was intended to provide protection not only for existing mobilehome owners but also for purchasers and prospective purchasers of mobilehomes in the City of Escondido.

PASSED, ADOPTED AND APPROVED by the City Council of the City of Escondido at a regular meeting thereof this 24th day of August, 1988.

IN THE
SUPERIOR COURT OF THE
STATE OF CALIFORNIA
CITY OF SAN DIEGO

DEFENDANT CITY OF ESCONDIDO'S DEMURRER TO PLAINTIFFS' COMPLAINT

Defendant, City of Escondido, demurrs [sic] to each of the causes of action alleged in Plaintiffs' Complaint on each of the following grounds:

1. The First Cause of Action does not state facts sufficient to constitute a cause of action; and

2. The Second Cause of Action does not state facts sufficient to constitute a cause of action.

DATED: January 2, 1989

IN THE
SUPERIOR COURT OF THE
STATE OF CALIFORNIA
CITY OF SAN DIEGO

DEFENDANT CITY OF ESCONDIDO'S MOTION TO STRIKE PORTIONS OF PLAINTIFFS' COMPLAINT

Defendant, City of Escondido, moves the Court for an order striking the following from Plaintiffs' Complaint:

1. From page 2, lines 28 to page 3, line 5, the following sentence: "The rent control law has had the effect of depriving the Plaintiffs of all use and occupancy of its real property and granting to the tenants of mobile homes presently in the Park, as well as the successor in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiffs."

2. From page 3, line 21, the following words: "of permanent physical occupation of a fixed reduced rent."

This motion is based on all pleadings, papers and records in this action, including the accompanying Memorandum of Points and Authorities.

DATED: January 2, 1989

IN THE
SUPERIOR COURT OF THE
STATE OF CALIFORNIA
CITY OF SAN DIEGO

EXHIBIT A TO DEFENDANT'S
MOTION TO STRIKE

AN ORDINANCE OF THE CITY OF ESCONDIDO
ESTABLISHING MOBILEHOME RENT
PROTECTION

1. Definitions. For the purposes of this ordinance, the following words, terms, and phrases shall be defined as follows:

(a) Board shall mean the Mobilehome Park Rental Review Board of the City of Escondido.

(b) Capital improvement shall mean the installation of new improvements and facilities and/or the replacement or reconstruction of existing improvements and facilities which consist of more than ordinary maintenance and/or repairs.

(c) Department shall mean the Community Development Department of the City of Escondido.

(d) Mobilehome shall mean a vehicle designed and equipped for human habitation and which is used as the principal place of habitation for the occupants thereof.

(e) Mobilehome park shall mean any area of land within the City of Escondido where two (2) or more mobilehome spaces are rented, or held out for rent, to accommodate mobilehomes used for human habitation.

(f) Mobilehome space shall mean the site within a mobilehome park intended, designed, or used for the location or accommodation of a mobilehome and any

accessory structures or appurtenances attached thereto or used in conjunction therewith.

(g) Owner shall mean the owner or operator of a mobilehome park or an agent or representative authorized to act on said owner's or operator's behalf in connection with the maintenance or operation of such park.

(h) Rehabilitation work shall mean any renovation or repair work completed on or in a mobilehome park which was performed in order to comply with the direction or order of a public agency, or to repair damage resulting from fire, earthquake, or other casualty.

(i) Rent shall mean the consideration paid for the use or occupancy of a mobilehome space.

(j) Rental increase shall mean any increase in rent charged by an owner to a tenant, including but not limited to lease offers, lease renewal offers, and increase in monthly rents.

(k) Tenancy shall mean the right of a tenant to use or occupy a mobilehome space.

(l) Tenant shall mean a person who has a tenancy in a mobilehome park.

2. The Mobilehome Park Rental Review Board. (a) The City Council of the City of Escondido shall serve as the Mobilehome Park Rental Review Board.

(b) The Board shall establish the time of any hearings or meetings held pursuant to this Ordinance and such hearings or meetings shall be held in the City Hall as often as the Board determines to be necessary to discharge its duties hereunder.

(c) Three (3) members shall constitute a quorum for the purpose of conducting a hearing or meeting. Decisions

of the Board shall be made by a majority vote of the members present.

(d) The duties and responsibilities of the Board shall include the hearing of all rent increase applications and determine either to approve or disapprove a rent increase in the manner provided for herein.

3. Base Rent. Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986. If a previously rented mobilehome space was not rented on January 1, 1986, the owner shall not demand, accept, or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to January 1, 1986. If a mobilehome space is rented for the first time after January 1, 1986, the owner shall not demand, accept, or retain rent for said space exceeding the rent first charged for the space. No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board. Except as herein provided, an owner shall not demand, accept or retain rent exceeding the rent in effect on January 1, 1986, for a mobilehome space that was not regulated by this section prior to January 1, 1986. If such mobilehome space was not rented on January 1, 1986, the owner shall not demand, accept or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to January 1, 1986.

4. Permitted Rent Increases Based upon an Application Approved by the Board. (a) An owner may file with the Department a rent increase application for one or more mobilehome spaces for approval by the Board.

(b) An application for a rent increase pursuant to this section shall be filed upon a form prescribed by the Department and shall be accompanied by the payment of a fee which will be determined by the Board; provided, however, that no fee shall be charged for applications filed within the first one hundred eighty (180) days after the effective date of this Ordinance. Said application shall specify the address of the mobilehome park, the space number or numbers for which rent is requested to be increased, the amount of the requested rent increase, and the facts supporting the requested increase. The applicant shall produce at the request of the Department any records, receipts, reports, or other documents that the Department may deem necessary for the Board to make a determination whether to approve a rent increase. The application shall be made under penalty of perjury and supporting documents shall be certified or verified as requested by the Department.

(c) Upon receipt of a rent increase application, the Department shall mail a notice to the affected tenants at the mobilehome spaces designated in the application, informing them of the receipt of such application, the amount of the requested rent increase, a brief summary of the owner's justification for the request, any supporting documents which may be inspected at the City Hall, the tenant's right to submit written statements, photographs or other documents relating to the application within thirty (30) days after the date the notice is mailed, and

the address where such statements or documents may be mailed or delivered.

(d) The Department shall determine within thirty (30) days after receipt of a rent increase application whether said application is complete. If the Department determines that said application is not complete, it shall notify the applicant in writing as to what additional information is required.

(e) A copy of each rent increase application shall be provided to each member of the Board after such application is determined to be complete. The Board shall hold a hearing on said application within sixty (60) days after such determination is made except as provided in subsection (i). Notice of the time, date, and place of the hearing shall be mailed to the applicant and the affected tenants at the mobilehome spaces designated in the application at least ten (10) days prior to the hearing.

(f) At the hearing, the applicant and the affected tenants may offer any testimony that is relevant to the requested rent increase. The applicant and affected tenants may offer documents, written declarations, or other written evidence for the first time at the hearing only if good cause is shown why such evidence was not filed with the Department prior to the hearing. Formal rules of evidence shall not be applicable to such proceedings. Except as provided in subsection (j), within fifteen (15) days after the close of the hearing, the Board shall make its determination, pursuant to the standards established by subsection (g) of this section, approving or disapproving a rent increase for the mobilehome space or spaces specified in the rent increase application.

(g) The Board shall approve such rent increases as it determines to be just, fair and reasonable. The Board

shall consider the following factors, in addition to any other factors it considers relevant, in making such determination.

(1) Changes in the Consumer Price Index for All Urban Consumers in San Diego Metropolitan Area published by the Bureau of Labor Statistics.

(2) The rent lawfully charged for comparable mobilehome spaces in the City of Escondido.

(3) The length of time since either the last hearing and final determination by the Board on a rent increase application or the last rent increase if no previous rent increase application has been made.

(4) The completion of any capital improvements or rehabilitation work related to the mobilehome space or spaces specified in the rent increase application, and the cost thereof, including such items of cost, including materials, labor, construction interest, permit fees, and other items as the Board deems appropriate.

(5) Changes in property taxes or other taxes related to the subject mobilehome park.

(6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located.

(7) Changes in the utility charges for the subject mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants.

(8) Changes in reasonable operating and maintenance expenses.

(9) The need for repairs caused by circumstances other than ordinary wear and tear.

(10) The amount and quality of services provided by the applicant to the affected tenant.

(11) Any existing written lease lawfully entered into between the applicant and the affected tenant.

(h) The Board may provide than an increase in rent or a portion of an increase in rent granted by the Board be limited to the length of time necessary to allow the park owner to reasonably amortize the cost of a capital improvement, including interest. Such increase granted as a result of the capital improvement shall not continue beyond the time necessary for reasonable amortization of the cost of such improvement.

(i) Notice of the Board's determination shall be mailed to the applicant and all affected tenants at the mobilehome spaces designated in the application. The determination of the Board shall be final.

(j) In the event that the Board is unable to act and make its final determination on a completed rent increase application within the time limitations prescribed by subsection (d)-(f) of this Section, and after the thirty (30) days for the tenant to file statements or documents in opposition to the application under subsection (e) shall have expired, the Board may approve such interim rent increase for the mobilehome space or spaces specified in said application which clearly appears to be warranted when the factors set forth in subsection (g) of this Section are considered, based upon the facts stated in the application, any written statements or documents filed with the Department by the affected tenants, and any other facts known to the Board. An approved interim rent increase shall expire on either (1) the last day of the month within which the Board makes its final determination disapproving a rent increase, or (2) the effective date

of a rent increase which is approved by a final determination of the Board.

(k) The time within which the Board may conduct a hearing as provided in subsection (e) or make its determination as provided in subsection (f) may be extended twice by the Board for periods of time not to exceed sixty (60) days each if the Board approves an interim rent increase pursuant to subsection (j).

5. Fees. A tenant whose tenancy is not regulated by the provisions of the Mobilehome Residency Law shall not be charged a fee for anything other than rent or utilities with the exception of incidental reasonable charges for services actually rendered.

6. Permissible Reasons for Terminating or Refusing to Renew a Tenancy. (a) A tenancy which is not subject to the provisions of the Mobilehome Residency Law shall not be terminated nor shall its renewal be refused, except for one or more of the following reasons:

(1) Failure of the tenant to comply with a local ordinance or State law or regulation relating to mobilehomes within a reasonable time after the tenant receives a notice of noncompliance from the appropriate governmental agency.

(2) Conduct by the tenant, upon the mobilehome park premises, which constitutes a substantial annoyance to other tenants.

(3) Failure of the tenant to comply with reasonable rule or regulation of the mobilehome park. No act or omission of the tenant shall constitute such failure to comply unless and until the owner has given the tenant written notice of the alleged rule or regulation violation

and the tenant has failed to adhere to the rule or regulation within seven (7) days.

(4) Nonpayment of rent, utility charges, or reasonable incidental service charges.

(5) Condemnation of the mobilehome park.

(6) Change of Use of the Mobilehome Park, provided that the provisions of Subsection (f) of Section 798.56 of the California Civic Code are followed.

(A) The owner gives the tenant written notice of the proposed change twelve (12) months or more before the date of the proposed change.

(B) The owner gives each proposed tenant whose tenancy will commence within twelve (12) months of the proposed change written notice thereof prior to the inception of his tenancy. (b) Notice of termination or refusal to renew must be given in writing in the manner prescribed by Section 1162 of the Code of Civil Procedure at least sixty (60) days prior to the termination date of the tenancy. Said notice shall state the date the tenancy terminates, the reason for the termination or refusal to renew, and the specific facts upon which the owner is relying.

7. Refusal of Tenant to Pay Illegal Rent.

A tenant may refuse to pay any rent in excess of the maximum rent permitted by this Ordinance. The fact that such unpaid rent is in excess of the maximum rent shall be a defense in any action brought to recover possession of a mobilehome space for nonpayment of rent or to collect the illegal rent.

8. Remedies. (a) Any person who demands, accepts or retains any payment of rent in violation of the provisions of this Ordinance shall be liable in a civil action to

the person from whom such payment is demanded, accepted or retained for damages in the sum of three (3) times the amount by which the payment or payments demanded, accepted, or retained exceed the maximum rent which could be lawfully demanded, accepted, or retained together with reasonable attorney's fees and costs as determined by the Court.

(b) Any person violating any of the provisions of this Ordinance shall be guilty of a misdemeanor and shall be punishable in the manner provided by Section 1-13 of the Escondido Municipal Code.

9. Severability. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and an independent provision and such decision shall not affect the validity of the remaining portion thereof.

IN THE
SUPERIOR COURT OF THE
STATE OF CALIFORNIA
CITY OF SAN DIEGO

EXHIBIT B TO DEFENDANT'S
MOTION TO STRIKE

ORDINANCE NO. 88-50

AN URGENCY ORDINANCE OF
THE CITY COUNCIL OF
THE CITY OF ESCONDIDO, CALIFORNIA,
CLARIFYING THE MOBILE HOME RENT
PROTECTION ORDINANCE CONCERNING
THE TREATMENT OF LONG TERM
LEASES AFFECTING CURRENT
AND NEW TENANTS

The City Council of the City of Escondido, California, in order to clarify the ordinance of the City of Escondido Establishing Mobilehome Rent Protection (the "Rent Protection Ordinance") DOES HEREBY ORDAIN as follows:

SECTION 1. For the purpose of implementing the Rent Protection Ordinance the term "Tenant" shall be understood to mean not only a person who has an existing tenancy in a mobilehome park but also a person who has purchased or is in the process of purchasing or otherwise acquiring a mobilehome that will remain at that particular park.

SECTION 2. Leases in excess of 12 months shall be treated as follows:

(a) Before any rental agreement or lease in excess of 12 months is offered to any tenant, it must first be submitted to the Rent Review Board (the "Board") for

review to determine if it complies with the terms of the Rent Protection Ordinance. It shall not be offered to the tenant until the proposed lease or rental agreement has been approved by the Board.

(b) Before any rental agreement or lease in excess of 12 months is executed by the tenant the owner must (1) offer the tenant the option of a rental agreement for a term of 12 months or less, (2) provide the tenant with a copy of the Rent Protection Ordinance, and (3) inform the tenant both orally and in writing that if the tenant signs a lease or rental agreement with a term in excess of 12 months which has been reviewed and approved by the Board in accordance with the provisions of the Rent Protection Ordinance, the lease or rental agreement may not be subject to the terms and protections of the Rent Protection Ordinance.

(c) A lease or rental agreement in excess of 12 months executed by a tenant shall not be exempt from the Rent Protection Ordinance unless it complies with each and every requirement in Civil Code Section 798.17(a) thru (c) for exemption for such leases or rental agreements offered to "homeowners."

SECTION 3. This ordinance shall take effect immediately after the date of its adoption.

SECTION 4. Separability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

SECTION 5. That all ordinances, or parts of ordinances, in conflict herewith are hereby repealed.

SECTION 6. That the City Clerk is hereby directed to certify to the passage of this ordinance and cause the same, or a summary prepared in accordance with Government Code Section 36933, to be published one time within 15 days of its passage in the Times Advocate, a newspaper of general circulation, printed and published in the City of Escondido.

DECLARATION OF URGENCY

Certain park owner are informing prospective mobilehome purchasers that the purchaser must sign a long term lease as a condition of the park owner's approval of the sale. As a result purchasers and prospective purchasers of mobilehomes in Escondido could be denied the benefits of the Mobilehome Control Protection Ordinance. In addition the actions of these park owners are causing substantial hardships to current mobilehome owners. Some current mobilehome owners have jobs waiting for them out of state, and escrows on other residences that are about to close but the actions of these park owners have discouraged and frustrated sales of their mobilehomes. Other current homeowners, particularly those who are elderly, are very concerned and worried that if a long term lease is required that they also will be unable to sell their mobilehomes. This situation has the potential to cause, if it has not already caused, adverse effects on the health and welfare of Escondido citizens. Therefore in order to prevent any additional hardships and adverse affects on the health and welfare of Escondido citizens it is necessary to immediately clarify the fact that the Mobilehome Rent Protection Ordinance was intended to provide protection not only for existing mobilehome owners but also for purchasers and prospective purchasers of mobilehomes in the City of Escondido.

IN THE
SUPERIOR COURT OF THE
STATE OF CALIFORNIA
CITY OF SAN DIEGO

COURT'S MINUTE ORDER OF DEFENDANTS (CITY OF ESCONDIDO) HEARING OF DEFENDANT CITY OF ESCONDIDO'S DEMURRER AND MOTION TO STRIKE

Number N42268, Court convened at 2:00 p.m., Reporter M. Provinse, Clerk K. Kennard, Date January 31, 1989 (oral argument 2-10-89) Judge Hon. Don Martinson, Department B, Plaintiff-Petitioner, John K. Yee, et al., Attorney for Plaintiff, Jagiello, Defendant-Respondent, City of Escondido, et al., Attorney for Defendant-Respondent, Lincoln

Demurrer sustained without leave to amend, General, causes 1 and 2.

Other: telephonic confirmed & modified. Judicial notice taken as requested. Motion to strike granted without leave to amend. On its own motion, Court dismisses this action.

IN THE
SUPERIOR COURT OF THE
STATE OF CALIFORNIA
CITY OF SAN DIEGO

NOTICE OF APPEAL
[Cal Rules of Ct., Rule i(a)]

NOTICE IS HEREBY GIVEN that plaintiffs JOHN K. YEE and IRENE S. YEE hereby appeal from the Order of the Court sustaining the Demurrer to Plaintiffs' Complaint Without Leave to Amend and Dismissing the Entire Action as to All Parties, entered herein on March 30, 1989, Notice of Entry of which was given to plaintiffs by defendant through service by mail on or about April 10, 1989.

Supreme Court, U.S.
FILED
NOV 27 1991
OFFICE OF THE CLERK

No. 90-1947

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE YEE, et al.,
Petitioners,

vs.

CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Does Escondido, California's mobilehome space rent control ordinance (the "Escondido Ordinance") take possessory interests in Petitioners' realty and transfer those interests to residents of Petitioners' mobilehome parks, without compensation, in violation of the Fifth and Fourteenth Amendments?

2. Does the Escondido Ordinance substantially advance a legitimate state purpose, or does it simply enrich those residents who were in place when the voters enacted rent control, by permitting them to sell the property rights transferred by operation of the Ordinance?

3. Does the Escondido Ordinance deprive Petitioners of interests in their property without due process of law, where its only effect is to transfer valuable property rights to residents, who can sell those rights, and increase housing costs for future residents?

LIST OF PARTIES

The parties to this proceeding are Petitioners, John K. Yee and Irene S. Yee, H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler d/b/a Moonglow Mobile Home Park, Casa de Amigos Mobile Home Estates, Vista Verde, Ltd., Imperial Escondido Mobile Estates and Mildred D. Tacey, and Respondent, City of Escondido.

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No. 90-1947

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE YEE, et al.,
Petitioners,

vs.

CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF FOR PETITIONERS

Petitioners, John K. Yee and Irene Yee, *et al.*, respectfully request this Court to reverse the judgment of the California Court of Appeal and remand these consolidated cases for trial.

OPINIONS BELOW

On March 30, 1989, the San Diego County Superior Court sustained the City of Escondido's demurrer to John and Irene Yee's complaint for failure to state a cause of action and dismissed the complaint. (Appendix C to Petition). The other Petitioners' claims were also dismissed on demurrer by the Superior Court. The

California Court of Appeal, Fourth Appellate District, Division One, in consolidated case No. D010307,[1] entered its opinion affirming dismissal of Petitioners' complaints on October 31, 1990. The opinion became final on February 4, 1991, and is reported at 224 Cal.App.3d 1349, 274 Cal.Rptr. 551. (Appendix A to Petition). The California Supreme Court denied Petitioners' timely consolidated petition for review on January 24, 1991. (Appendix B to Petition).

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. section 1257. Petitioners contend that the Escondido Ordinance operates to appropriate interests in their property in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and deprives them of interests in their property without due process of law in violation of the same amendments. The decision of the California Court of Appeal affirming dismissals by the San Diego Superior Court was filed on October 31, 1991. The California Supreme Court denied review on January 24, 1991.

On April 30, 1991, pursuant to Petitioners' application, Justice O'Connor entered an order extending the time for filing of the petition for a writ of certiorari to and including June 23, 1991. Petitioners filed the Petition with this Court by deposit in the United States mails on June 19, 1991; this Court received the Petition on June

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[1]The following case numbers were consolidated at the request of the Court of Appeal: D010307, D010769, D010805, D010942, D010972, D011011, D011046, D011115, D011027, D011028, D011029, and D011030. The clerk's transcripts for the first eight cases are relevant to this appeal.

21, 1991. This Court granted the writ of certiorari on October 15, 1991.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The California Mobilehome Residency Law, codified at Sections 798 *et seq.* of the California Civil Code, regulates mobilehome space tenancies and the operation of mobilehome parks. Park owners cannot (1) terminate tenancies without specified cause; (2) require removal of mobilehome coaches when tenancies end; or (3) disapprove incoming tenants who purchase mobilehome coaches, so long as the purchasers are creditworthy and unlikely to violate park rules. Cal. Civ. Code §§ 798.55, 798.73, 798.74 (West 1991). (Pertinent portions of the California Mobilehome Residency Law are reproduced verbatim at App. D to Petition.).

The Escondido Municipal Code Article V, Sections 1-9 (the "Escondido Ordinance"), codifies Proposition K, a voter initiative passed on June 7, 1988, that imposed rent control on Escondido's 29 mobilehome parks. Section 3 of the Escondido Ordinance provides:

> Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986. . . . No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase

> from [the City Council, which serves as the Mobilehome Park Rental Review Board].

The Escondido Ordinance further provides that "[a]ny person who demands, accepts or retains any payment of rent in violation of the provisions of this Ordinance shall be liable in a civil action to the person from whom such payment is demanded, . . ." and "any person violating any of the provisions of this Ordinance shall be guilty of a misdemeanor." Escondido Ordinance § 8(a), (b). Section 6 duplicates eviction and termination provisions of the Residency Law for tenancies not subject to the statute.[2] The Escondido Ordinance contains no provision for rent adjustments when tenancies end upon transfer of a mobilehome coach. (The full text of the Escondido Ordinance appears at J.A. 21-30).

STATEMENT OF THE CASE

Petitioners in these consolidated cases own nine of Escondido's twenty-nine mobilehome parks. Residents in the mobilehome parks rent those spaces, on which they place their mobilehome coaches. Residents enjoy the use of private streets, common areas, and such amenities as swimming pools and clubhouses. Mobilehome coaches are prefabricated structures that are purchased from dealers, towed into place, and then installed on prepared spaces and connected to the park's utility systems and prepared for occupancy. They are personal property.[3] Once installed, mobilehome coaches may be removed, but removals are rare.

[2]Under California law, certain long term leases of mobilehome spaces are exempt from local rent controls. Cal. Civ. Code § 798.17 (West 1991).

[3]*Hall v. Santa Barbara*, 833 F.2d 1270, 1273 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988).

Petitioners' properties are subject to California's Mobilehome Residency Law. Under the Residency Law, mobilehome park owners may not evict tenants without just cause, require removal of the mobilehome coach when tenancies end, or disapprove incoming tenants who purchase mobilehome coaches in place, unless the incoming tenant has poor credit, or is unlikely to obey park rules. On June 7, 1988, by a vote of 11,148 to 9,499, Escondido voters approved Proposition K, an initiative ordinance imposing strict rent and eviction controls on the City's 3,656 mobilehome spaces. Thirty days after the election, rents were reduced to the levels in effect two and a half years earlier. Rent increases became misdemeanors, unless approved by the City Council, sitting as the Mobilehome Park Rental Review Board. Mobilehome park owners may petition the City Council for rent increases on various grounds, but there is no provision for any rent adjustment when mobilehome coaches are sold in place.

On December 1, 1988, John and Irene Yee filed suit under 42 U.S.C. section 1983 against the City of Escondido (the "City") in San Diego County Superior Court, alleging that the Escondido Ordinance, as applied to their property, operates to take interests in their property in violation of the Fifth and Fourteenth Amendments and Article I, Section 19 of the California Constitution. The factual allegations in the complaint (and those in the related cases with which the Yees' case was later consolidated) are indistinguishable from the claims sustained in *Hall v. Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), and *Pinewood Estates v. Barnegat Township Leveling Bd.*, 898 F.2d 347 (3d Cir. 1990), and later proved in *Azul Pacifico Inc. v. Los*

Angeles, ___ F.2d ___, Nos. 90-55853 & 90-56066, slip op. 15213 (9th Cir. Nov. 1, 1991).

The Yees alleged that the Escondido Ordinance, operating in conjunction with the California Mobilehome Residency Law, transfers to their tenants a valuable possessory interest in the realty, akin to a leasehold, without compensation. Specifically, the Escondido Ordinance transfers the rights to: (1) occupy a mobilehome space in perpetuity, (2) pay below market rent in perpetuity, (3) select the next tenant to occupy the space, (4) fix the successor tenant's effective rent by charging a premium on the sale of the mobilehome coach, and (5) sell, bequeath or pass by intestacy all of these rights which previously inhered in the mobilehome park owner's property. The Yees sought damages in inverse condemnation, a declaration of the constitutional invalidity of the Escondido Ordinance, and a permanent injunction against further enforcement of those provisions that do not allow a mobilehome park owner to increase rents upon transfer or sale of a mobilehome coach.

The Superior Court ruled that Petitioners' complaints stated no claim and sustained the City's demurrers without leave to amend. Petitioners appealed, but the California Court of Appeal declined to follow the federal precedent set by *Hall* and *Pinewood* and affirmed the trial court's dismissal of the consolidated actions. The California Supreme Court denied the petition for review of the Court of Appeal's decision. By order dated October 15, 1991, this Court granted the Petition for Certiorari, as to the taking and due process questions presented in the Petition. Petitioners ask this Court to reverse the decision below, with instructions to remand to the trial court for trial.

SUMMARY OF ARGUMENT

Petitioners in this case do not challenge rent controls generally. They do challenge those provisions of the Escondido Ordinance that prevent rent adjustments when mobilehome coaches are sold in place. The inevitable result (as Petitioners allege, and as proved at trial in a similar case) is to allow the incumbent tenant to charge a large premium for his used mobilehome when he decides to move. That premium — equivalent to future rent savings — represents the value of a possessory interest in the realty, created by operation of the Ordinance. The only real effect of the provisions that Petitioners challenge is to transfer valuable, marketable property rights from the property owner to tenants in residence at the time Escondido voters enacted the Ordinance.

That constitutes a taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Ordinance allows incumbent tenants to choose their successors and pocket a large resale premium, which represents the value of the property rights taken from the owner by operation of law. The Ordinance thus authorizes a permanent physical occupation of Petitioners' property without compensation.

Operation of the Ordinance must also be judged a taking under the criteria of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The operation of the Ordinance abridges Petitioners' rights to exclude others and to possess, use and dispose of their property. It severely affects the value of their residual interest in the land, frustrates their investment-backed expectations by effectively transferring to tenants the right to realize any appreciation the property may enjoy. Finally, unlike ordinary land use controls upheld by the courts, the Escondido Ordinance confers no reciprocal or general

advantages to property owners, or, for that matter, to successor tenants. It serves only to enrich those in residence when Escondido voters enacted the Ordinance.

Operation of the Ordinance must also be deemed a taking under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), because it does not substantially advance a legitimate state interest. It transfers valuable interests in property to incumbent tenants, but confers little or no benefit upon their successors (who are compelled to pay large premiums) and no benefits whatever on property owners.

For the same reasons, the Ordinance deprives Petitioners of property without due process of law because it lacks "a real and substantial relation to the objective sought to be attained." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980).

ARGUMENT

Emboldened by the political popularity of rent control, various state and local governments have gone further and transferred landlords' property interests to their tenants. The voters of Escondido, California did just that by enacting an initiative ordinance in June 1988. Because many more voters are renters than owners of rental properties, Petitioners have no prospect of obtaining just compensation for the property taken from them other than through this suit under the Constitution.

The Escondido Ordinance effects a government-authorized permanent physical occupation of Petitioners' property, transfers valuable property interests from Petitioners to their tenants and, while taking Petitioners' property without compensation, advances no legitimate interest of government. The court below erred in dismissing Petitioners' claims under the Fifth and Fourteenth Amendments to the Constitution for the taking of their property and the violation of their due process rights.

I. ESCONDIDO HAS TAKEN PETITIONERS' PROPERTY WITHOUT COMPENSATION.

The Escondido Ordinance, either standing alone or in combination with the California Mobilehome Residency Law, works a severe deprivation of Petitioners' property rights. The ordinance takes permanent possessory interests in real estate from property owners and gives them to tenants. This is a government-authorized permanent physical occupation of Petitioners' property and, under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), must be compensated. The ordinance also has "an unduly harsh impact upon the owner's use of the property," so that, under the criteria of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), a taking has occurred. Finally, the ordinance does not advance, substantially or otherwise, any legitimate governmental interest and so fails the test of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

A. Escondido Has Taken Petitioners' Property By Physical Occupation.

When government takes from a landowner the right of possession and confers that right upon another, the government has taken property by permanent physical occupation. The Escondido Ordinance does that by transferring from Petitioners and giving to their tenants the following: (1) the right to occupy the property in perpetuity; (2) the right to pay a rent below market rent in perpetuity; (3) the right to select the next tenant to occupy the property; (4) the right effectively to set and

collect the next tenant's rent by charging a premium on the sale of the mobilehome coach; and (5) the right to sell, bequeath, or let pass by intestacy all of these rights that were previously the park owner's property. Petitioners do not challenge rent controls as such. They do challenge the operation of Escondido's Ordinance, as applied to their properties, insofar as it appropriates interests in those properties.

The rights taken from Petitioners constitute a permanent possessory interest in their land. Because possession is at a rent well below market, this interest has a substantial monetary value. But for the Escondido Ordinance, Petitioners would have retained or could have sold such interests at the market price. Instead, incumbent tenants have been given this property and persons who want to become tenants bid tens of thousands of dollars more than the market value of the mobilehome coaches, precisely because ownership of each coach carries with it, by law, a permanent possessory interest in Petitioners' land.

The total loss to the landowners is very severe. In *Azul Pacifico Inc. v. Los Angeles,* ___ F.2d ___, Nos. 90-55853 & 90-56066, slip op. 15213 (9th Cir. Nov. 1, 1991), the court noted that "[o]ne Mrs. Morrison, for example, testified that she bought a coach in Azul Pacifico's park for $77,000 and immediately sold it for $5,000 and had it removed from the pad. When asked why, she responded: 'The use of the land was what I paid for more than the place.'" *Id.,* slip op. 15213, 15218. The $72,000 that Mrs. Morrison had paid for the use of the land was precisely the monetary value of the bundle of rights that the city had taken from the land owner and transferred to the tenant, who sold it to her. In other words, the former owner of a nearly worthless mobilehome coach had sold Mrs. Morrison the use of another citizen's land. That, as

the *Azul Pacifico* court held, was a taking of property within the meaning of the Fifth and Fourteenth Amendments. So it is here. A property interest compensable under the Takings Clause is "that value which is capable of transfer from owner to owner and thus of exchange for some equivalent." *Kimball Laundry Co. v. United States,* 338 U.S. 1, 5 (1949). Petitioners seek the opportunity to prove at trial that the interests taken by Escondido fit that description.

While there are various ways of characterizing takings, a right of permanent possession is, quite obviously, government-authorized permanent physical occupation of Petitioners' property. Thus, this situation is, as two federal Circuits have held, indistinguishable from *Loretto. See Hall v. Santa Barbara,* 833 F.2d 1270 (1987); *Pinewood Estates v. Barnegat Township Leveling Bd.,* 898 F.2d 347 (3d Cir. 1990); *Azul Pacifico,* slip op. 15213.

In *Loretto,* this Court answered in the affirmative "the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." 458 U.S. at 421. The case now before the Court presents precisely the same question, except that the permanent physical occupation of the owner's property is not minor but major.[4] Otherwise the cases are identical.

The New York law at issue in *Loretto* compelled landlords to allow cable television companies to install cable equipment on rental properties. Teleprompter installed cables, directional taps and two large silver boxes on

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[4]This case also differs from *Loretto* in that, as will be shown below, the Escondido Ordinance serves no legitimate public purpose.

Loretto's apartment building. The Court rejected attempts to defend the statute under the criteria in *Penn Central.* The City argued that: (1) the invasion of Loretto's property was very minor, consisting of a few small items of equipment in otherwise unused space; (2) there was no significant economic impact upon the owner; and (3) the statute was only an innocuous land use regulation or adjustment of landlord-tenant rights. This Court rejected all of these contentions, holding that the forced permanent occupation of even a small portion of Loretto's property by a third party was an unconstitutional taking of her property. The Court rejected the City's attempt to apply the *Penn Central* criteria to permanent physical occupations and recognized a *per se* rule that such occupations constitute compensable takings:

> In short, when the "character of the governmental action" is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Loretto, 458 U.S. at 434-35 (citation omitted).

The Court also rejected the City's argument that the statute could be defended as a legislative creation of a right to cable installation "as an appurtenance to the tenant's leasehold." *Id.* at 439. The Court held that "the government does not have unlimited power to redefine property rights." *Id.*

The City had argued that there was no taking because an invasion of private property by a private party was different from an invasion by government. The Court responded that "[a] permanent physical occupation authorized by state law is a taking without regard to

whether the State, or instead a party authorized by the State, is the occupant." 458 U.S. at 432 n.9 (citing *Kaiser Aetna v. United States,* 444 U.S. 164 (1979)). Here, as in *Loretto,* a party (or a series of parties, each taking by sale or descent from the previous tenant as authorized by law) has been governmentally authorized to occupy Petitioners' land permanently.

Nor does it matter that the Escondido Ordinance applies only to rental property. The Court rejected that distinction in *Loretto* as well: "We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation." *Id.* at 439. The argument rejected by the Court was an attempt to analogize New York's law to an ordinary rent control statute and thus to deny any taking. Petitioners are not attacking the constitutionality of rent control without compensation. They challenge the taking of an interest in real estate that goes far beyond controlling rents.

As in *Loretto,* the law permits the occupant of the plaintiff's property to sell rights obtained by operation of law. Suppose that this Court had held that the attachment of cable television facilities to the apartment building was not a taking. If Teleprompter chose to sell its cable television business, it would have been able to sell its attachments to apartment buildings. The New York law would thus have enabled Teleprompter to occupy a portion of Loretto's property and to sell the right to occupy her property and others' in perpetuity. That is exactly what has happened here and, as in *Loretto,* the property owners have suffered a taking for which they are constitutionally entitled to just compensation.

The landlord's twin obligations to accept as a tenant any purchaser of a mobilehome coach on his property and to charge only the controlled rent to the incoming tenant

mean that a departing tenant can sell not only his mobilehome coach but a right to permanent occupancy at a rent below the market level to a person of his choosing. The departing tenant sells, and the incoming tenant acquires, a present possessory interest akin to a permanent statutory leasehold. The right to occupy land permanently at below market rent is an estate in land of substantial monetary value. *See United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945). The Escondido Ordinance by itself, in the absence of state law, can create that right. The Escondido Ordinance in combination with the California mobilehome Park Residency Law inevitably accomplishes that end. The result is that the departing tenant charges a premium for that right in the price of his mobilehome to the incoming tenant. The premium, which amounted to more than $20,000 per space in *Azul Pacifico*, slip op. 15213, 15230-31, represents the capitalized value of a right to occupy land in perpetuity at less than market rentals. As the *Hall* court observed:

> [T]he landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City . . . .

833 F.2d at 1279. As this Court has since observed, "[t]his element of *required acquiescence* is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) (emphasis supplied).

Three panels of two United States Courts of Appeals following this Court's precedent have held that ordinances like Escondido's take from the owner and transfer to the tenant a present possessory interest in the realty. This transfer, the courts held, was accomplished by authorizing a permanent physical occupation which was a taking within the meaning of the Constitution. The Ninth Circuit so held in *Hall*. 833 F.2d at 1276 (the ordinance "transferred a possessory interest in [the owners'] land" consisting of "the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent"). That holding was reaffirmed in *Azul Pacifico*, slip op. 15213, 15218, 15225, following a trial where claims essentially identical to these Petitioners' were proved. The Third Circuit so held in *Pinewood*. 898 F.2d at 353 ("[T]he physical invasion of their properties and the uncompensated creation of interests in them worked by the Barnegat Ordinance in connection with the state law is far more pronounced than that in *Loretto*.").

These courts' decisions were compelled not only by *Loretto*, but also by *Nollan*, 483 U.S. at 839; *Kaiser Aetna*, 444 U.S. at 179-80; and *United States v. Causby*, 328 U.S. 256 (1946).

In *Nollan*, the California Coastal Commission had required owners of oceanfront property to grant a public access easement across their private beach. This Court said: "We think a 'permanent physical occupation' has occurred for purposes of [the *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises." 483 U.S. at 832. In this case, particular individuals were given the right to station themselves permanently on the premises and, since that right is alienable, a stream of individuals may pass through Petitioners' property.

Kaiser Aetna dealt with a similar situation. Kaiser Aetna owned a pond which it developed as a marina and cut through a barrier beach to connect the pond with a

bay of the Pacific Ocean. The Army Corps of Engineers, which had previously informed the company that no permit was required, then asserted that the connection made the pond navigable water subject to a navigational servitude available to the general public. This Court refused to accept the government's contention that, as a result of making the improvements, the "owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property — the right to exclude others." 444 U.S. at 176. "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of Petitioners' private property; rather the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina." *Id.* at 180.

Similarly, *Causby,* 328 U.S. at 265, held that the government had taken an easement in property by a "direct invasion of respondents' domain" when military aircraft regularly flew so low over the land as substantially to lessen its value and interfere with its use as a chicken farm.

In *Hall,* the Ninth Circuit, relying on these precedents, "held that the challenged ordinance could be found to transfer a possessory interest in land to the mobilehome tenants, and thus constituted a physical occupation." *Azul Pacifico,* slip op. 15213, 15221. In *Pinewood,* the Third Circuit reached the same conclusion:

> [T]he physical invasion of their properties and the uncompensated creation of interests in them worked by the [ordinance] in connection with the state [residency] law is far more pronounced than that in *Loretto.* Here, there has been a permanent transfer of the appellants' possessory interests to each tenant to occupy a rent controlled pad. Thus, although the interest belongs to the appellants, the landlords, the effect of the law is to transfer the interest, without compensation, from the landlords to the tenants. Accordingly, a tenant may, by determining the purchaser of his mobile home, select the new tenant for the park and command a premium for the alienation of the right to occupy the pad at a controlled rent to the complete exclusion of the appellants. The combined impact of the statute and the ordinance operates to deprive the appellants of their possessory interest in the pad permanently.

898 F.2d at 353. Hence, as in *Loretto,* the Escondido Ordinance "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto,* 458 U.S. at 435. Petitioners submit that this Court's decisions require the conclusion that Escondido has taken Petitioners' property by permanent physical occupation.

B. Escondido Has Taken Petitioners' Property Under the Criteria of *Penn Central,* by an Oppressive Deprivation of Property Rights.

The Escondido Ordinance, alone and in concert with state law, cuts across the property owner's rights to possess, use and dispose of the property, and it is those rights that inhere in property, rather than land, buildings or other tangible things, that enjoy constitutional protection. *General Motors,* 323 U.S. at 377-78. *Penn Central* calls for an examination of the character and economic effect of government action, as well as interference with distinct, investment-backed expectations. On all counts, the effects are severe.

1. The Escondido Ordinance deprives Petitioners of protected property rights.

Quite aside from the question of physical occupation, Petitioners have suffered such a severe deprivation of their rights in real property that the conclusion of an uncompensated taking is unavoidable. Escondido has taken from Petitioners their rights to possession of their land, their rights to receive rents, their rights to enjoy any future appreciation of their lands' value, and their rights to leave their property to their heirs. The "character of the governmental action," *Penn Central*, 438 U.S. at 124, cuts across the property owner's right to use, possess and dispose of his property.

The right to possession includes the right to exclude others, which is a fundamental property right. Petitioners' right to exclude has been abridged by the forced occupation of the premises by an "interloper with a governmental license." *Florida Power*, 480 U.S. at 253. *Kaiser Aetna* held that though the company retained the ownership and use of its marina, the Government's imposition of a navigational servitude had infringed the " 'right to exclude,' . . . universally held to be a fundamental element of the property right [which fell] within the category of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179-80. Similarly, *Nollan*, 483 U.S. at 832, held that California's imposition of an easement destroyed the property owners' " 'right to exclude [others,] "one of the most essential sticks in the bundle of rights that are commonly characterized as property," ' " (quoting *Loretto*, 458 U.S. at 433 (quoting *Kaiser Aetna*, 444 U.S. at 176)).

The right to use of the property as income property has been abridged. Ownership of real property has long included the right to enjoy its rents and profits. As Justice

Holmes noted in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the right to mine coal has value because it can be exercised with a profit. *Id.* at 414. Equally, what makes the right to own a mobilehome park valuable is the right to collect rent for the use of spaces, common areas and amenities. The "use" of Petitioners' property as income property is the ability to collect rents. The right to collect rents exists as an incident of ownership of real property and is personal property to the extent that it is an element of contract created by a lease. "Valid contracts are property," *Lynch v. United States*, 292 U.S. 571, 579 (1934), and under California law, "[t]here may be ownership . . . of all obligations." Cal. Civ. Code § 655 (West 1991). This Court has demonstrated its willingness to protect the right to keep the value of the use of the property. An asset's earnings are "incidents of ownership" just as the asset itself is property, and both enjoy constitutional protection. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Petitioners do not challenge all rent controls as such,[5] but in Escondido the right to collect rents has been effectively transferred from the owner of the property to departing tenants, who are empowered to sell to others the right to possess the property at reduced rents. *Accord, Hall*, 833 F.2d at 1278-79.

The right of disposition has been effectively transferred to the tenant in possession, who reaps a windfall by

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[5]Petitioners note that this Court has never considered the operation or application of rent controls, except as a temporary measure in time of war or its aftermath; nor has the Court considered laws that compel property owners to offer accommodation for rent at controlled rates. *See, e.g., Block v. Hirsh*, 256 U.S. 135 (1922); *Bowles v. Willingham*, 321 U.S. 503 (1944). The Court need not reach those issues to decide this case.

selling the property rights guaranteed by the ordinance in addition to his mobilehome coach. Residents in place can demand premiums, which incoming residents (like Mrs. Morrison in *Azul Pacifico*) are willing to pay, because they are selling and buying the use of the *owner's* land. In *Hall*, the Ninth Circuit distinguished precedents cited by the City of Santa Barbara (notably decisions upholding rent controls enacted under the war power) because in none of those decisions had there been any suggestion that the tenant's right to reduced rent was transferable, had a market value, or was in fact traded so that tenants could reap a windfall. *Hall*, 833 F.2d at 1278. The existence of such windfalls was proved in *Azul Pacifico*. There can be no clearer example of the infringement, even destruction, of constitutionally protected rights of possession, use and disposition, than sale of the use of another citizen's land.

2. The economic impact of the Escondido Ordinance is severe.

The economic impact is immense: creation of 1,237 estates in land in Petitioners' mobilehome parks, estates that may be worth tens of thousands of dollars each, if the facts to be proved here are like those proved in *Azul Pacifico*.

Petitioners receive controlled rents which decline in constant dollars because of inflation. The tenants' rental expense also declines in constant dollars, so the value of the leasehold interests created by the Escondido Ordinance will increase as the margin between market and controlled rent grows wider from year to year. If rent increases were allowed when vacancies occur, Petitioners

would be able from time to time to narrow this margin.[6] Under the existing ordinance (with its "vacancy control" provision), when tenants in residence at the time of the June 1988 election move away, they can collect in premiums the difference between market and controlled rents. Since tenants sell use of the owner's land along with their mobilehome coaches, they can capture any nominal appreciation in land values attributable to inflation, as well as any real appreciation attributable to location, market conditions and the like.

Petitioners can sell or bequeath only what remains to them, and their ownership is now subject to permanent, below-market leaseholds imposed by operation of law. Their residual interest, a leased fee, will be worth far less than the unencumbered fee interest they owned before June 1988. The crucial point is not simply the severe economic loss, but the reason for that loss: a redistribution of interests in the realty. The total value of all interests in the property (*i.e.*, the park owner's leased fee and the tenants' leaseholds) should remain the same (measured in constant dollars, all other things being equal). But as the owner's share of the bundle of rights shrinks by operation of law so does the value of the owner's residual interest.

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[6] Tenants, like the rest of us, are not immortal; nor are they immune to the normal familial and economic pressures that occasion vacancies even in rent controlled housing. If they are denied the right to cash out, tenants can enjoy the benefits of rent control only so long as they remain tenants, not beyond. When the premises become vacant, the landlord is able to reassert a measure of control over his property.

Hall, 833 F.2d at 1279 (footnote omitted).

3. The Ordinance interferes with reasonable investment-backed expectations.

For the same reasons, the interference with Petitioners' investment-backed expectations is severe: destruction of any prospect of capital gain, a usual goal for investments in real estate. Investors in income property hope to operate profitably, so that rents exceed expenses and debt service, then sell the property for more than the purchase price. For that reason, standard appraisal analysis estimates operating income over the term of ownership plus the later reversion when the property is sold.[7] Since the value of any income property is a function of future earnings, which decline in constant dollars, property values, adjusted for inflation, are certain to decline. This decline can be arrested and restored from time to time if property owners are permitted to bring rents to market when vacancies occur. Under the Escondido Ordinance, however, the decline is progressive and permanent.

Looked at another way, the Ordinance transfers valuable rights to residents in place in June 1988, including the right to occupy the space permanently for reduced rent. Residents may sell those rights to their successors for a price equal to "the capitalized value of both the use value (foregone rents) and the possessory interest (the right to exclude)." *Azul Pacifico,* slip op. 15213, 15232. The value of the property owner's remaining interest in his property

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[7] *See, e.g.*, Society of Industrial Realtors, INDUSTRIAL REAL ESTATE 121 (4th ed. 1984) (emphasis supplied) ("Essentially, the return on industrial real estate can be divided into two separate areas, annual income flow and capital appreciation. As a very practical matter, both *income flow and capital appreciation* are, and should be, considered in calculating return on investment. . . . [T]he two together *constitute the total return anticipated on the investment.*")

declines accordingly, as the city conceded in *Azul Pacifico. Id.*, slip op. 15213, 15231 n.9.

This decline in the value of the owner's property (or more precisely, his residual interest in the property) thus differs fundamentally from reductions in value occasioned by ordinary land use regulations *because the decline reflects a transfer of property rights to third party occupants.* Moreover, the Escondido Ordinance confers no benefits on mobilehome park owners or, for that matter, incoming residents obliged to pay large premiums for used mobilehome coaches.

Petitioners assert rights in their property, including the right to such fruits of their property as appreciation, if it occurs. Petitioners, like other investors, expected to operate their properties profitably, and ultimately, to sell them for more than the original price. At trial, Petitioners expect to prove that those expectations were the basis for their decisions to develop or purchase their properties. They had, in other words, distinct, investment-backed expectations — expectations thwarted by the Escondido Ordinance. The marketplace may or may not bear out their expectations, but the City cannot frustrate those expectations by appropriating interests in property without first paying just compensation.

4. The Escondido Ordinance affords no reciprocal advantages.

Agins v. Tiburon, 447 U.S. 255, 260-61 (1980), teaches that private and public interests must be weighed. Often, zoning and other land use regulations are upheld because they benefit all citizens, even those whose properties bear the principal burden. *See, e.g., Penn Central,* 438 U.S. at 133-35. The Escondido Ordinance benefits residents in place at the time of the June 1988 election. Future

residents pay large premiums for mobilehome coaches, so they obtain no benefit (except to the extent they may capture future appreciation of the land when they sell). The Ordinance confers no benefit whatsoever upon the owners of mobilehome parks.

Penn Central teaches that the presence of a taking by regulation is to be determined, in part, by the magnitude of the owners' loss. *Id.* at 124. Had Petitioners been permitted to proceed to trial, they would have undertaken to prove that they sustained substantial losses, comparable to those proved in *Azul Pacifico*.[8] But the magnitude of the loss to the property owners here is much greater than in *Penn Central* for the additional reason that the company there received compensating benefits. Petitioners here receive no benefit whatever from this Ordinance that has taken so many of their rights in property.

The New York law at issue in *Penn Central* permitted an owner whose property had been designated an historic landmark to transfer his development rights to other properties, thus mitigating the burden of the regulation. The Court reasoned, moreover, that all citizens, including the owners of Grand Central Station, benefited from the preservation of historic landmarks. The property remained in precisely the condition it was, and the Penn Central company could make some use of air space by transferring development rights to other parcels.

None of this is true of Petitioners' property. The City has simply taken part of the property. Petitioners receive absolutely nothing in return to mitigate their loss. In *Penn Central*, there was admittedly a permissible govern-

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[8]The City could, of course, very substantially reduce those damages by revising its ordinance to eliminate any constitutional taking for the future.

mental goal that was advanced by appropriate means. The Escondido Ordinance takes Petitioners' property in a way that advances no legitimate governmental purpose.

II. THE TRANSFER OF RIGHTS IN PETITIONERS' REAL PROPERTY DOES NOT SUBSTANTIALLY ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST AND THUS CONSTITUTES A TAKING.

A statute takes property if it does not *substantially* advance legitimate state interests. *Nollan*, 483 U.S. at 834 n.3. *Nollan* held that California's imposition of an easement upon the Nollans' property had little connection with the justifications advanced for the exaction. Without an adequate nexus between ends and means, the Court reasoned, the purpose became "quite simply, the obtaining of an easement . . . but without payment of compensation." *Id.* at 837.

This Court also stressed in *Nollan* that the nexus requirement is more stringent than its counterpart under the Equal Protection Clause. *Id.* at 835 n.3. More is required than a plausible reason:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. . . . [O]ur cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest.

Id. at 841 (emphasis in original). Measured by these standards, Escondido's ordinance cannot pass constitutional muster.

The Escondido Ordinance contains no recitals or findings, so its purposes are obscure. The June 1988 ballot described the measure as "mobilehome rent control . . . , providing as a base rent the rent in effect on January 1, 1986." (J.A. 7). The City's opposition to the petition to this Court asserted that:

> The Escondido Ordinance seeks to remedy an inequitable market situation caused by the scarcity of mobilehome spaces by protecting mobilehome owners from unreasonable space rental increases therefore protecting the homeowner's [*sic*] investments, while also providing park owners with a just and reasonable return on the park owner's [*sic*] investment.

Respondent's Brief in Opposition at 27.[9] The Escondido Ordinance does not, and cannot, achieve any of these purposes.

Controlling rents is the supposed purpose. *But no one actually pays the controlled rent.* The tenant in residence when the Ordinance was enacted pays far less. Later residents pay far more. The tenant in place in June 1988 pays controlled rent until he leaves. At that point, he receives the monetary value of future rent savings in the form of a resale premium, even though he will not be there. The premium offsets his rent payments during occupancy, so overall, he pays far less than the controlled rent. In fact, depending on how soon he leaves, this tenant may actually recover in the premium an amount larger

[9]Had Petitioners been permitted to go to trial, they would have offered evidence that handbills were distributed at the Petitioners' mobilehome parks urging residents to vote for the initiative with these words: "You Can Dramatically Increase The Value of Your Homes."

than the sum of his rent payments. He will have made a profit by living in the mobilehome park.

By contrast, the incoming tenant does not pay the controlled rent and receives no benefit from it since he must pay a large premium, equal to the capitalized value of the difference between controlled rent and market rent. *Azul Pacifico,* slip op. 15213, 15225. He pays the equivalent of market rent, but pays the difference between market rent and controlled rent in advance to the former tenant rather than to the owner of the property. No legitimate purpose is served by such an irrational scheme. This defeats the purpose of the Escondido Ordinance, however it may be characterized. The only goal accomplished is a one-time wealth transfer from property owners to tenants in residence at the time of the election in June 1988.

The Escondido Ordinance can do nothing to alleviate alleged scarcity of spaces in mobilehome parks. By rolling rents back to the level of January 1986, then holding them below market, even when mobilehome coaches are sold in place, the Ordinance tends to deter new construction.[10] Keeping rents frozen when homes are sold in place does nothing to alleviate the effects of scarcity. The fortunate citizens in residence when the initiative passed may col-

[10]The Hirsch study attributes the dearth of new mobilehome parks in California to "the severity of mobilehome rent controls." Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 463 (1988).

In apparent recognition of the deterrent effect of local rent control upon new construction, state law now exempts from local rent controls any "newly constructed [mobilehome coach] spaces initially held out for rent after January 1, 1990." Cal. Civ. Code §§ 798.7, 798.45 (West 1991).

lect windfalls when they move away and sell the bargain leasehold created by the Ordinance, as well as their mobilehome coaches. Other residents will pay (or, at still greater cost, finance) resale premiums that effectively wipe out any saving.

Nollan calls for a close fit between means and ends. 483 U.S. at 838. Protecting investments in depreciable personal property by granting estates in underlying land "does not even meet the most untailored standards." *Id.*[11]

In *Azul Pacifico*, the Ninth Circuit suggested, based on trial testimony, that restrictions like those at issue here might protect residents from exorbitant rent demands that could depress mobilehome prices to distress levels. *Id.*, slip op. 15213, 15228. Indiscriminate appropriation of leasehold interests from all mobilehome park owners has little connection with the supposed purpose of preventing abusive conduct and fails to satisfy the close fit requirement of *Nollan*.

The means have little to do with the end, which could easily be served by other means that do not appropriate citizens' property. "We . . . need to know . . . the availability and effectiveness of other less drastic protective steps . . . ." *Goldblatt*, 369 U.S. 590, 598 (1962).[12] If prevention of predatory business practices were the objec-

[11]Mobilehome coaches are personal property. *Hall*, 833 F.2d at 1273. Standard references such as the Kelley Blue Book confirm that mobilehome coaches depreciate, like most personal property. *Id.* at 1274 n.5.

[12]The insistence upon a nexus between the end sought here and the means used is a variant of the harms test. Not having caused the harm, the bulk of the park owners now are asked to underwrite alleged losses which are not consequences of their conduct. *See Goldblatt*, 369 U.S. 590, and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

tive, Escondido could adopt a variety of measures tailored to that objective, such as regulations limiting rent increases at resale to market rates, determined without reference to local rent controls.[13]

Moreover, the risk of exorbitant rent demands when mobilehomes are offered for sale is illusory.[14] Rational owners who wish to raise rents when mobilehome coaches are sold would be foolish to demand rents that deter listings and sales and so foreclose any opportunity to raise rents. Common sense and the owners' own interests will lead to market rents, which incoming residents already pay under the Ordinance, albeit in the guise of a resale premium. The risk of isolated, aberrational or even irrational abuses does not justify wholesale appropriation of leasehold interests in *all* mobilehome spaces.

[13]In response to *Hall*, many California cities have enacted such regulations. For example, the City of San Jose has enacted an ordinance in explicit response to the *Hall* decision suspending vacancy control until the City Attorney certifies that such provisions do not constitute a compensable taking. San Jose, Cal., Ordinance No. 23914.

[14]The only serious analysis of the actual operation of ordinances like Escondido's was published by Hirsch & Hirsch, *supra* note 7. They examined 344 mobilehome coach sales in 40 California cities. Forty percent of those sales came from cities subject to rent controls. Generally, resale prices for mobilehome coaches exceeded the sales price of comparable coaches sold by dealers, plus transportation and installation costs. In other words, they found what is known in the industry as "placement value." Where rents remained controlled, and mobilehome coaches were sold in place, prices were still higher. If "gouging" or other predatory conduct were widespread, and distress sales common, resale prices would be below "blue book" prices offered by dealers; but such "negative placement value" is rare. *Id.* at 426-28, 440, 445.

To pass constitutional muster under *Nollan* and *Agins* the Escondido Ordinance must *substantially* advance legitimate state interests. The prohibition upon rent adjustments when mobilehomes are sold in place serves no such purpose, enriches one group at the expense of a few, and violates the Takings Clause of the Fifth Amendment.

III. THE ORDINANCE DEPRIVES PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW BECAUSE THE MEANS CHOSEN ARE NOT REASONABLY NECESSARY TO ACHIEVE THE STATED GOALS AND THE ORDINANCE WORKS AN UNDULY OPPRESSIVE RESULT UPON PETITIONERS.

Petitioners' complaints state claims for deprivation of property without due process of law and, if the allegations are established at trial, the Escondido Ordinance must be stricken as constitutionally infirm with or without compensation.

The Court has long held that even where the existence of a public purpose is established, the means chosen to achieve that purpose must be "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Lawton v. Steele*, 152 U.S. 133, 137 (1894). The test of *Lawton* has been described as the "classic statement of the rule" and remains valid today. *Goldblatt*, 369 U.S. at 594. The Due Process Clause protects against arbitrary and capricious governmental action. While the Court is not cast in the role of a superlegislature, there remains a need for limited review of both the purpose and the means chosen. "[O]ur cases have not departed from the requirement that the government's chosen *means must rationally further* some legitimate state purpose." *Moore v. East Cleveland*, 431 U.S.

494, 498 n.6 (1977) (emphasis added). The vitality of the substantive due process clause exists in an economic context. *See Lynch v. Household Fin. Co.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one"); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

While it is correct that the courts grant great deference to legislative decisions regarding economic matters in general and rent control in particular, *see, e.g., Pennell v. San Jose*, 485 U.S. 1 (1988), if the action is arbitrary the Due Process Clause will be invoked to invalidate the provisions of an ordinance that are not rational and related to a legitimate governmental purpose. *See, e.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Moore*, 431 U.S. 494.

The specific provision at issue in this case is the vacancy control provision. The courts are obligated under the Due Process Clause to determine whether that provision has "a real and substantial relation to the objective sought to be attained." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980) (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)).

The Court has not settled on a particular form of words to express the "rational means" leg of the test. It has spoken at various times of "a real and substantial relation to the object sought to be obtained";[15] "means . . . reasonably necessary for the accomplishment of the purpose";[16] "a reasonable relation to some purpose";[17] "a reasonable

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[15] *PruneYard*, 447 U.S. at 85 (quoting *Nebbia*, 291 U.S. at 525).

[16] *Goldblatt*, 369 U.S. at 595 (quoting *Lawton*, 152 U.S. at 137).

[17] *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

relation to the State's legitimate purpose";[18] "no relation to the legitimate end";[19] "no relation to the elimination of those evils";[20] "a manifest tendency to cure or at least to make the evil less";[21] "demonstrably irrelevant to the policy the legislature is free to adopt";[22] "means . . . rationally further[ing] some legitimate state purpose";[23] or "a rational means to achieve [the] purpose."[24] Under any of these formulations, the basic requirement is the same: there must be some reasonable nexus between the stated goal and the means supposedly invoked to serve that goal. Merely stating a worthy purpose will not validate a measure that plainly has no tendency to accomplish the purpose. In applying this test, "the reasonableness of each regulation depends upon the relevant facts." *Nebbia,* 291 U.S. at 525.

As discussed in connection with *Nollan,* on the allegations of the complaints, Escondido's prohibition of rent increases when mobilehome coaches are sold fails to meet this test. The ostensible purposes include the alleviation of scarcity and its effects, and the preservation of affordable housing. In reality, the Ordinance completely fails to

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[18]*Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 125 (1978).

[19]*Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 424 (1952) (noting issue not presented).

[20]*Daniel v. Family Security Life Ins. Co.,* 336 U.S. 220, 224 (1949).

[21]*North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 167 (1973) (quoting *Liggett Co. v. Baldridge,* 278 U.S. 105, 115 (1929) (Holmes, J., dissenting)).

[22]*In re Permian Basin Area Rate Cases,* 390 U.S. 747, 770 (1968) (quoting *Nebbia,* 291 U.S. at 517).

[23]*Moore,* 431 U.S. at 498 n.6 (plurality opinion).

[24]*Id.* (White, J.).

serve these purposes. Rather, as the courts found to be true in *Azul Pacifico,* the Ordinance instead shifts the incoming resident's housing cost from rent to initial purchase price (and probably mortgage payments). Thus, it does nothing to ameliorate housing costs for incoming tenants. It does operate to transfer interests in property, and with them, a large portion of the property's value, from the park owner to the incumbent tenant — a purpose not reasonably defensible as (and not claimed to be) a legitimate governmental goal.

> [T]his Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.

Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55, 80 (1937); *accord, e.g., Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 245 (1984) ("[T]he Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party . . . [or] a particular class of private individuals").

Nor is the ordinance saved by the suggestion that a secondary goal is to prevent unscrupulous landlords from threatening to increase rents so much upon sale that incumbents are unable to find buyers. *See Azul Pacifico,* slip op. 15213, 15228. This asserted purpose assumes that park owners will act irrationally and directly contrary to their obvious self-interest. The hypothesis seems to be that if rent increases upon resale are not controlled, a park owner will demand such high rents from incoming tenants that the incumbents will be unable to sell. If rents were allowed to rise when mobilehome coaches were sold, an owner whose demands prevented sales would deprive himself of his only opportunity for an increase. This is so

unlikely as to be fanciful. The Court is not obligated to accept at face value a theory that does not make economic sense. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Even assuming that there might be a foolish park owner somewhere who might act in this self-defeating fashion — a point on which no evidence has been adduced, due to the premature dismissal of this case on the pleadings — this ordinance would hardly be a "means . . . reasonably necessary for the accomplishment of the purpose." *Goldblatt*, 369 U.S. at 595 (quoting *Lawton*, 152 U.S. at 137).

These facts, as alleged in the complaint, serve to explain why this case is different from the many modern cases that have rejected challenges based on arbitrariness or irrationality. In nearly all of them, the focus of the attack was on the legitimacy of the purpose sought to be served. But once that purpose was held to be a valid one, there was little or no room for a serious contention that the challenged provision did not serve the goal. Thus, for example, in *Midkiff*, the approved public purpose was to break up oligopolistic land holdings and encourage more widespread fee ownership of land. This purpose was plainly served by condemning portions of the large holdings for transfer to residents, especially since the statute forbade transfers of multiple parcels to particular individuals and required hearings as to whether particular condemnations would further the purposes of the act. 467 U.S. at 233-34, 242. In *PruneYard*, the purpose was to promote wider opportunities for free public expression; that goal was undeniably served by requiring shopping centers to permit peaceable petitioning. 447 U.S. 74. In *Goldblatt*, the problem was the dangerous and noxious operation of underwater mining within town limits, and the solution was to ban such operations. 369 U.S. 590. In *Nebbia*, the evil was price instability in the milk market,

and the cure was price control. 291 U.S. 502. In *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), the evil was insufficient professional control and oversight over the conduct of pharmacy businesses; the cure was to require that owners or majority stockholders of pharmacies be licensed pharmacists. In *Berman v. Parker*, 348 U.S. 26 (1954), the problem was pervasive slum conditions, and the solution was condemnation to allow a balanced, coordinated redevelopment effort. In *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), the goal was to encourage voter turnout, and the means was to forbid employers to penalize employees for time taken off to vote. In all of those cases, unlike this one, the direct, logical connection between the asserted goal and the means employed was quite clear.

The lower court in this case dismissed Petitioners' complaints on demurrer, without giving Petitioners any opportunity to try to prove their case. The City's argument in support of this act amounts to an assertion that the courts are obligated to accept any proffered justification of a statute at face value, no matter how tenuous its logic or dubious its assumptions. If that were the law, there would be no point in pretending to have a constitutional protection against irrational and arbitrary laws, for there is probably no possible enactment that cannot be *somehow* argued to support some legitimate purpose, if the logic of that argument is deemed to be entirely immune from any judicial scrutiny. Although parties challenging a law as irrational bear a heavy burden of proof, they cannot properly be denied their opportunity to carry that burden. They are entitled to introduce evidence in support of the contention. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938)) (both equal protection cases); *cf. Goldblatt*, 369 U.S. at 595-96

(rejecting an irrationality challenge because the challenging party failed to introduce evidence to carry his burden). While it is true that the Court will not second-guess reasonable legislative choices based on conflicting empirical evidence, Petitioners should have their day in court to try to prove that the Ordinance does not reasonably serve any of its purported purposes.

CONCLUSION

For these reasons, the judgment of the California Court of Appeal should be reversed with instructions to remand these consolidated cases for trial.

Dated: November 27, 1991

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Court of Appeal was correct in ruling that the City of Escondido's Mobilehome Rent Protection Ordinance did not effect a federal taking by failing to permit unregulated increases in space rent whenever a mobilehome is transferred from one homeowner to another.

2. Whether the Court of Appeal was correct in ruling that the City of Escondido's Mobilehome Rent Protection Ordinance does not violate federal substantive due process by failing to permit unregulated increases in space rent whenever a mobilehome is transferred from one homeowner to another.

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BRIEF FOR RESPONDENT

STATEMENT

Petitioners, owners of mobilehome parks in Escondido, California, challenge the City of Escondido's Mobilehome Rent Protection Ordinance ("Ordinance") on the grounds that it violates the Taking and Due Process Clauses of the United States Constitution.[1] Petitioners would have this Court believe that, in an act of political caprice, the voters of Escondido enacted an ordinance that stripped mobilehome park owners of their rights to possess, derive rents from, realize appreciation in, and dispose of their property, and transferred those rights to mobilehome owners residing in their parks. In fact, the Escondido Ordinance simply regulates petitioners' use of their property—which was already dedicated to a highly regulated business purpose—in order to keep rents affordable and to protect the legitimate investment expectations of mobilehome owners in their mobilehomes. As such, the Ordinance is an entirely permissible exercise of Escondido's police power, and does not violate either the Taking or the Due Process Clause of the Constitution.

I. PROCEDURAL HISTORY OF THE CASE

On July 30, 1986, petitioners John and Irene Yee purchased Sunset Terrace and Friendly Hills Mobilehome Parks, which are located within the city limits of respondent City of Escondido.[2] At about that time, the average

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[1] There are eight petitioners in this case. In addition to John and Irene Yee, the other petitioners are the H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler, dba Moonglow Mobile Home Park, Casa de Amigos Mobile Home Estate, Vista Verde, Ltd., Imperial Escondido Mobile Estates and Mildred D. Tacey. Four other park owners whose suits are described in note 4, *infra*, did not join in the Petition for Certiorari. For convenience, respondent will use the term "petitioners" when referring to all petitioners, and will identify individual petitioners where appropriate.

[2] *See Yee* v. *Mobilehome Park Rental Review Bd.*, No. N51754, Administrative Record at 379-80 (San Diego Super. Ct. 1991), and

space in these parks rented for approximately $203 (Sunset) and $205 (Friendly Hills) per month. By June 1988 the Yees had raised the average rents to $264 (Sunset) and $263 (Friendly Hills), an increase of 28-30%.[3] On July 8, 1988, pursuant to Escondido's Mobilehome Rent Protection Ordinance, these rents were rolled back to the 1986 rent levels. See *infra* pp. 11-12 (discussing the regulatory history).

On December 1, 1988, rather than seeking a rent increase as permitted by the Ordinance, petitioners filed this suit in the Superior Court of San Diego County. They alleged that the Ordinance deprived them "of all use and occupancy of [their] real property and [granted their] tenants . . . the right to physically permanently occupy and use [their] real property" without compensation "other than the stream of income from rents regulated by the Rent Control Law." Complaint ¶ 6; Joint Appendix ("JA") 3. They further alleged that their "tenants" could sell their "coaches" at excess values "due to the rights of permanent physical occupation at a fixed reduced rent which [had] been transferred to" them by the Ordinance. *Id.* at ¶ 8; JA 4. Accordingly, they alleged that the Ordinance effected a "taking" of their property in violation of Article I, § 19 of the California Constitution, the Fifth and Fourteenth Amendments of the United States Constitution, and their rights under 42 U.S.C. §§ 1981 and 1983, and they sought damages of $6 million. *Id.* at ¶¶ 10-12; JA 4-5. In a second cause of action, petitioners alleged that the Ordinance was constitutionally infirm because no emergency justified its

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Yee v. *Mobilehome Park Rental Review Bd.*, No. N51755, Administrative Record at 428-29 (San Diego Super. Ct. 1991) (respectively describing Sunset Terrace and Friendly Hills and the Yees' rent increase applications for these parks).

[3] During the same period the U.S. Department of Labor, Bureau of Labor Statistics, reported that the "All Items" Consumer Price Index (CPI) for urban consumers in the San Diego Metropolitan area (1982-84=100) rose from 113.3 (July 1986) to 121.9 (1st half 1988), a 7.5% increase, and the San Diego "Rent, residential" CPI rose from 130.8 to 138.4, a 5.8% increase.

enactment. *Id.* at ¶ 16; JA 5. Petitioners did *not* allege that the Ordinance effected a "regulatory taking" under the criteria of *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978). On March 30, 1989, the Superior Court granted the City's Demurrer and dismissed petitioners' complaint. Pet. App. C42-44.[4]

On appeal, petitioners reiterated their "physical occupation" taking theory and added a substantive due process claim alleging that the Ordinance was irrational because it did not preserve low- and moderate-income housing opportunities. The Fourth District Court of Appeal rejected both arguments and affirmed the trial court's decision. Pet. App. A1-40. Specifically, the Court rejected the Ninth Circuit's reasoning in *Hall* v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988), upon which petitioners principally relied, and concluded that the Ordinance did not effect a physical occupation of petitioners' property. Pet. App. A3-4. After recognizing the complementary relationship between mobilehome park space rents and the resale price of mobilehomes sold in place in parks (*id.* at A8-11), the court added:

> [w]here the price charged for a good or service is excessively high due to monopoly or other unfair conditions, it necessarily follows that the price for complementary goods and services will be artificially low. Where a government regulation purports to reduce the excessive and unfair price to a reasonable level,

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[4] During the period May 12, 1989 to June 16, 1989, eleven additional suits were filed by other mobilehome park owners seeking an additional $40 million in damages from City. By late September 1989 each of the cases had been dismissed by the San Diego Superior Court and all cases had been appealed to the state Court of Appeal. On May 16, 1990, pursuant to stipulation of the parties, all cases were consolidated for purposes of appeal and decision by the Court of Appeal. The parties further agreed that all cases would be submitted for decision by the Court of Appeal on the briefs and oral argument in the *Yee* case. Stipulation and Order, Opposition to Petition A4-6.

> the mere fact that the price for complementary goods and services rises as a result does not transmute an otherwise reasonable price regulation into a compensable "taking."

Id. at A11-12. The Court of Appeal then determined, on the basis of the only record before it, that the controlled rents were "fair and reasonable":

> [P]laintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a "fair" rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no "taking."

Id. at A14. Because the issue was not raised by petitioners, the Court did not address the question whether the Ordinance effected a regulatory taking under the criteria of *Penn Central*.

Since they filed this suit, the Yee petitioners have sought and received rent increases.[5] Because they were unsatisfied with these increases, they sought review and damages from the City in a state law action under Sections 1094.5 and 1095 of the California Code of Civil Procedure.[6]

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[5] On June 2, 1989, the Yees filed applications seeking rent increases under the Ordinance of $131 per month (64%) for Sunset Terrace and $129 per month (63%) for Friendly Hills. In addition to arguing that the rent rollback to 1986 levels was unconstitutional, the Yee's contended that they needed the requested increases in order to obtain a fair return based on the current market value. On December 5, 1990, following a hearing, the Board granted a $27.50 per month (13%) increase for each park.

[6] On October 25, 1991, the San Diego Superior Court upheld the Board's rent decisions and dismissed the damage claims. *Yee* v. *Mobilehome Park Rental Review Bd.*, Nos. N51754, N51755 (San Diego Super. Ct. 1991). By December 27, 1991, petitioners had filed a notice of appeal to the Court of Appeal.

II. REGULATORY HISTORY

Despite their name, modern mobilehomes (sometimes referred to as manufactured housing) are a form of immobile prefabricated housing. Indeed, because moving and installing such homes entails substantial costs, and because spaces in mobilehome parks are often scarce, most mobilehomes make but one trip—from the factory or showroom to an installation site. Their immobility—*i.e.*, the fact that they are fixed and permanent residences—and their relatively low cost have made these homes extremely popular.[7] Their immobility and the scarceness of mobilehome park spaces, however, gave rise to the problems that Escondido sought to redress through the ordinance at issue in this litigation.

A. The Development Of Mobilehomes As A Legitimate Residential Alternative

The first mobilehomes, which were typically homemade and most frequently used for camping, were trailers of a few hundred square feet that could easily be hitched to vehicles. To accommodate these trailers, many municipalities built camps during the 1920's hoping to encourage tourism. While long-term occupancy of such camps was not uncommon, it was not until the Depression of the 1930's that use of these trailers as a form of permanent housing became widespread. During the next decade, nu-

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[7] Today, mobilehomes situated on rented spaces in mobilehome parks account for more than two million residences in the United States. More than 375,000 such residences, in approximately 5,800 mobilehome parks, are located in California. *See* California Department of Housing and Community Development, Division of Codes and Standards, *Summary of Mobilehome Park Statistics* (Aug. 28, 1990). Escondido has a total of 29 active mobilehome parks containing approximately 3,500 spaces. California Department of Housing and Community Development, *Mobilehome Parks in Escondido* (Oct. 19, 1990). Based on an average household size of 1.69 persons (San Diego Association of Governments, *City of Escondido's Mobile Home Needs Survey* 5 (1988)), the City estimates that over 6,000 of Escondido's 104,000 inhabitants reside in mobilehomes. Approximately 3,100 (87%) of the spaces are rented from the park owners, with the remaining spaces owned by homeowners.

merous additional mobilehome parks were built to meet immediate and temporary housing needs, particularly near military bases. These origins helped foster the early perception of "trailer parks" as a form of "slum" housing inhabited by indigent and rootless members of society. This image, together with hostility from real estate interests, hotels, and tourists camps, initially fostered local land use regulations designed to exclude mobilehome parks or restrict their development.

Beginning in the 1950's, however, mobilehomes began a gradual transformation to broadly accepted permanent residences. Larger, standardized, sectionalized mobilehomes were manufactured which could be moved only by trucks,[8] and today homes of 1400 square feet or more are increasingly common. With the advent of these larger units, which permitted more conventional floor plans, mobilehomes became accepted as permanent living quarters.

The trend toward physical immobility and permanence coincided with extensive efforts to improve the quality of mobilehome parks, which evolved from small, unplanned facilities to larger, carefully designed communities that often featured amenities such as clubhouses, swimming pools, greenbelts and landscaping, and extensive social programs. Many senior citizens[9] and younger families[10] have been attracted to mobilehome park living by these amenities and by the relatively low housing cost.

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[8] For example, between 1955 and 1980, the average size of mobilehomes tripled from approximately 360 to 1050 square feet. Nutt-Powell, *Manufactured Homes: Making Sense of a Housing Opportunity* 53 (1982); Drury, *Mobilehomes: The Unrecognized Revolution in American Housing* 102 (rev. ed. 1972).

[9] The March 27, 1990, County of San Diego, *County-Wide Mobilehome Task Force Final Report* found that 80% of the spaces in the County were occupied by "senior households," which are "generally small elderly families with fixed incomes." *Id.* at 5.

[10] Mobilehomes "allow young families to afford a home they would otherwise be unable to buy in today's excessively priced market. Not only do these families receive the positive benefits from pride of home ownership, but it also allows them to gain a foot hold in the market and perhaps purchase some other form of housing in later years." *Id.*

Recognizing the valuable contribution they made to the nation's stock of affordable housing, the federal government, beginning in the late 1960's and early 1970's, adopted a number of measures that spurred the growth and social acceptability of mobilehomes. Congress, for example, extended insurance for mobilehome park construction and purchases of mobilehomes[11] and authorized the adoption of uniform federal standards that both promoted mobilehome safety and preempted diverse and conflicting local design specification standards that had hindered mobilehome production.[12] By 1982, these efforts and a number of demographic trends had combined to make mobilehomes

> a significant source of affordable housing for American families, particularly first-time homebuyers, the elderly, and low- and moderate-income families. Manufactured homes accounted for almost 36 percent of all single-family homes sold in the United States in 1981, and for the vast majority of those sold for under $50,000.[13]

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[11] *See generally Shepard's Mobile Homes and Mobile Home Parks*, § 4.2 (1975 ed. & Cum. Supp. 1990-91) (describing federal legislation, including 12 U.S.C. § 1464(c)(6)(J), which authorized federal savings associations to finance manufactured homes).

[12] National Manufactured Housing Construction and Safety Standards Act of 1974, Pub. L. No. 93-383, 88 Stat. 700 (1974), as amended by Pub. L. No. 96-399, 94 Stat. 1641 (codified at 42 U.S.C. § 5401 *et seq.*).

[13] *The Report of the President's Commission on Housing* 85-86 (1982). Although the prices of mobilehomes vary greatly depending on their size, condition and location, the average reported resale price of a mobilehome sold in place on a rental space in the Escondido area is approximately $30,000. California Mobilehome Report, Appraisal Edition, *Resales, San Diego County* (June-Aug. 1991). This is approximately one quarter of the price of a conventional site-built home in the same area. North San Diego County Multiple Listing Service, *Single Family Properties* (Jan.-Sept. 1991) (median sales price of home in Escondido area $125,000).

As mobilehomes have become more permanent, the relationship between park owners and homeowners has shifted from a strict landlord-tenant relationship (similar to that in residential apartments) to a relationship between co-investors in a joint venture. In this relationship, the park owner provides investment in the site, utilities, and other amenities and the homeowner provides concurrent investment in the mobilehome and its appurtenances.[14] Both parties to this relationship have obligations: The homeowner is obligated to pay rent and abide by the rules of the park; the park owner is obligated to provide space, amenities, and a safe and sanitary park. Likewise, where neither party has an unfair bargaining position, both parties may benefit: The homeowner receives a location for his home investment and the park owner receives a return on his park investment through space rent. Where there is a shortage of available spaces, however, the park owner can take advantage of the fact that the homeowners in his park cannot simply withdraw their investments and the park owner can charge monopoly rents. Even when there are other spaces available, the park owner may be able to extract excessive rents from homeowners because it is extremely expensive to move a "mobile" home.[15] In these situations, individual homeowners may have no choice—they must pay the excessive rent or lose their entire investment.

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[14] While a park owner's investment may vary greatly depending upon the land cost, amenities provided, and year of purchase or construction, it is rare that a park owner's investment per space equals that of the homeowner's. *See, e.g.*, City of Los Angeles, Rent Stabilization Division, Community Development Department, *Rental Housing Study: Mobile Home Parks Under Rent Stabilization* ("Los Angeles Study") 11, 33 (1985) (average mobilehome owners have triple the investment of park owners in their spaces); *see also Oceanside Mobilehome Park Owner's Ass'n* v. *City of Oceanside*, 157 Cal. App.3d 887, 204 Cal. Rptr. 239, 255 n.10 (Cal. Ct. App. 1984) ("collectively, the manufactured home owners have a greater investment than does the manufactured home park owner").

[15] *See* Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 419-20 (1988) (describing this as "quasi-rent").

B. The California Mobilehome Residency Law

Despite the increasing importance of mobilehomes to the stock of affordable housing in California, the very nature of mobilehome parks limits their development. In populated areas, the very large amount of land necessary for a mobilehome park makes new development rare. In addition, minimum lot sizes, density restrictions, and zoning requirements further limit park development. The increasing demand for mobilehomes as housing, combined with the fact that new parks are not being developed, creates a situation where the vacancy rate in mobilehome parks is near zero, both in Escondido[16] and elsewhere.[17]

Because of this scarcity, park owners in California are in a substantially better bargaining position than mobilehome owners. Many park owners have in the past taken advantage of their monopoly power by charging exorbitant entrance fees, tying use of the mobilehome space to the purchase of unwanted services, and charging excessive exit fees to residents who wished to sell their mobilehomes in place. By evicting homeowners who could not relocate elsewhere, park owners also have been able to purchase the residents' homes at distress prices.

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[16] At the Yee petitioners' subsequent rent increase hearing, petitioners' own appraiser introduced evidence of rents at 14 other comparable parks. As to each he described "vacancies" as "0" or "none." *See Yee* v. *Mobilehome Park Rental Review Bd.*, No. N51755, Administrative Record at 98-128 (San Diego Super. Ct. 1991).

[17] In Los Angeles, vacant mobilehome spaces "were found to be virtually non-existent." Los Angeles Study at 56. Studies of mobilehome parks in Alameda, Santa Clara, and Ventura counties made similar findings. Baar, *Mobilehome Ownership in Fremont* 13-14 (Aug. 1991) (no vacancies found in Santa Clara or Alameda Counties); Sanchez Talarico Associates, Inc., *Alternative Location and Replacement Housing Opportunities Study for Oxnard Mobile Home Lodge* 52 (Sept. 1988) (fewer than one out of every 1,000 spaces in Ventura County vacant).

To prevent many of these abuses, the California legislature enacted the Mobilehome Residency Law (Cal. Civ. Code § 798 *et seq.* (Deering 1990)), to limit park owners' otherwise unfettered discretion to evict homeowners or to refuse to rent spaces to prospective purchasers of mobilehomes. In passing the law, the legislature specifically found that "the owners of mobilehomes occupied within mobilehome parks [should] be provided with the unique protection from actual or constructive eviction." *Id.* at § 798.55(a). Even with the protections that this statute affords homeowners, however, park owners may terminate or refuse to renew a homeowner's tenancy for a number of reasons, including failure to pay rent, utility charges or reasonable incidental service charges (*id.* at § 798.56(e)); failure to comply with local ordinances (*id.* at § 798.56(a)); substantially annoying other homeowners (*id.* at § 798.56(b)); or failure to comply with reasonable rules and regulations. *Id.* at § 798.56(d).

Moreover, park owners may charge a transfer fee as a condition of sale if they perform certain services (*id.* at § 798.72); may forcibly remove a home at the time of sale if it fails to meet certain size, health and safety standards (*id.* at § 798.73); and may refuse to rent to a new homeowner who lacks the financial ability to pay the rent or whom the park owner reasonably determines, based on the purchaser's prior tenancies, will not comply with the rules and regulations of the park. *Id.* at § 798.74. Finally, and perhaps most critically, the statute specifically recognizes the right of park owners to alter the use of their property entirely. *Id.* at § 798.56(g).[18]

[18] To alter the use of a park, the management must, *inter alia*, provide notice to the homeowners that it intends to seek a permit for change of use (Cal. Civ. Code § 798.56(g)(1) (Deering 1990)), and, after approval of the change of use by the appropriate government entity, it must give homeowners at least six months notice of termination. *Id.* at § 798.56(g)(2).

C. The Escondido Mobilehome Rent Protection Ordinance

Even with these protections in place, park owners remained free to extract higher rents than they could collect in a competitive housing market, and indeed rents increased rapidly during the late 1970's and early 1980's. To combat this problem approximately 75 jurisdictions adopted mobilehome rent control statutes by the mid-1980's. Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 406-07 (1988). Most of these statutes contained restrictions on the rents a park owner could charge a new owner when a mobilehome was sold or transferred on site. *Id.* at 412.

The City of Escondido's initial response was not to impose rent control. Instead, it encouraged homeowners and park owners to engage in negotiations that in 1983 yielded a Mobilehome Park Accord Ordinance (Escondido Ordinance 83-34) that established a mechanism for resolving disputes.[19] Rents, however, continued to escalate, and on June 8, 1988, the voters of Escondido approved the initiative ordinance (Proposition K) that is the subject of this suit by a margin of 11,148 votes for to 7,850 against. *San Diego Union*, June 9, 1988, at A4.[20]

[19] The Accord Ordinance permitted 51% of the homeowners in a park to seek to resolve problems, including rent disputes, through mediation by a committee consisting of representatives chosen by both homeowner and park owner groups. Although the Accord procedure was used at least seven times during 1983-86 period, it had limited utility because the Accord Committee's recommendations were not binding on the park owners.

[20] Proposition K was subsequently ratified by City Council Resolution 88-291 on June 28, 1988, and has been codified at section 29-101 *et seq.* of the Escondido Municipal Code. The Ordinance became effective July 8, 1988. On August 24, 1988, the City enacted Urgency Ordinance 88-50 to (1) prevent park owners from forcing existing and prospective homeowners to sign long term leases, and (2) provide notice that such long term leases might exempt spaces subject to such leases from the benefits of rent protection. JA 16-18.

Because several park owners had been increasing their rent in anticipation of rent control, the Escondido Mobilehome Rent Protection Ordinance set the "base rent" at the rental rate of January 1, 1986. Ordinance § 3; JA 23. Park owners, however, are entirely free to seek rent increases whenever and as often as they choose. To obtain such an increase, a park owner must file an application with the City Community Development Department. *Id.* at § 4(a); JA 24.[21] Once an application is complete, notice is mailed to affected homeowners (*id.* at § 4(c); JA 24), who then have the right to submit written statements, and other documents in response. *Id.* Within 60 days after the application is complete, the Mobilehome Park Rental Review Board ("Board")[22] must hold a hearing (*id.* at § 4(e); JA 25), at which the park owner and the affected homeowners may offer any testimony that is relevant to the requested rent increase. *Id.* at § 4(f); JA 25. Following the hearing the Board considers 11 stated factors "in addition to any other factors it considers relevant" (*id.* at § 4(f) & (g); JA 25-27), and based on this evaluation "the Board . . . shall approve such rent increases as it determines to be just, fair and reasonable." *Id.* at § 4(g); JA 25. The determination of the Board is subject to review by the state courts. Cal. Civ. Proc. Code § 1094.5 (Deering 1990).

The Rent Protection Ordinance is only one element in Escondido's evolving effort to solve mobilehome problems. Over the past few years the City has: (1) assisted in the

[21] There is no restriction on the number of spaces that must be included in the park owner's application, *i.e.*, it can be "for one or more mobilehome spaces" (*see* Ordinance § 4(a); JA 24), nor is there a restriction on the number of times per year that such an application can be made. The Ordinance waived the application fee for the first 180 days after the law went into effect (*id.* at § 4(b); JA 24), and the application fee waiver was later extended by resolution to December 1, 1989. Pursuant to Escondido Resolution No. 91-256, the current cost of an application fee is $850 plus $2 for each affected space.

[22] The members of the Board are also the City Council members. *See* Ordinance § 2; JA 22.

conversion of Rancho Escondido, a 338 space park, by helping the homeowners obtain interim financing to allow them to purchase their spaces and by providing low-income purchasers with loans totaling $500,000; and (2) purchased the Views, a 152 space park, for $5.6 million, and Mountain Shadows, a 209 space park, for $7.8 million.[23] The City is currently operating both parks and is providing assistance to the homeowners in these parks to purchase their own spaces, including approximately $1.3 million in loans for low-income purchasers at the Views and $1.7 million in loans for low-income purchasers at Mountain Shadows.[24]

SUMMARY OF ARGUMENT

I.

A. This Court's "takings" decisions have consistently distinguished between physical occupation of an individual's property and mere regulation of the use of that property. Physical occupation is a *per se* taking, which requires compensation, and therefore the Court has narrowly restricted the type of claims that fall within this category. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

Even though Escondido's Rent Protection Ordinance does nothing more than regulate the monopoly rents petitioners may charge mobilehome owners, petitioners assert that the Ordinance effects a government-authorized permanent physical occupation of their property. This attempt to recast a rent control provision as a permanent physical occupation is untenable and would undermine completely the value of having a bright-line rule for this

[23] The City acquired Mountain Shadows Mobilehome Estates in March, 1991. The parties to the transaction agreed to dismiss all pending litigation and release all claims. Accordingly, the City believes that Mountain Shadows, a petitioner in this case, is no longer a proper party to these proceedings.

[24] All three of the above mentioned parks are subject to rent protection for the spaces which continue to be rented.

form of taking. If this regulatory scheme constitutes a physical occupation, it is impossible to predict what actions will be treated as *per se* takings by the courts.

The "element of required acquiescence" lies "at the heart of the concept of [physical] occupation." *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987). That requirement is completely missing from legislation that regulates the amount of rent paid to occupy property that the property owner voluntarily holds out for rent. Moreover, the Ordinance's regulation of rents does not deprive mobilehome park owners of any recognizable—much less legally protected—interest in property; it merely prevents them from taking unfair advantage of their monopoly power.

B. Petitioners' alternative "takings" argument, that the Ordinance effects a "regulatory taking" under the criteria of *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978), also fails. First, this argument is not properly before this Court because it was neither litigated nor decided below. See *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983). Moreover, because petitioners did not seek a rent increase prior to instituting this suit, it is plainly unripe. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985).

Even if the regulatory taking claim had been properly presented, it is without merit because the Ordinance, on its face, does not deprive petitioners of all economic use of their property; they continue to rent their property and receive a fair and reasonable return. Certainly nothing in the Constitution requires them to receive more than a reasonable return on their investment. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 495-96 (1987).

In addition, the Ordinance substantially advances legitimate state interests. It directly protects current homeowners from excessive rents and provides them with reasonable assurance that their investments in their homes will not be jeopardized by unrestricted rent increases.

As the Ninth Circuit has correctly held, "the ordinance does protect existing tenants from being forced to sell their [homes] at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the[ir] coach[es]." *Azul Pacifico, Inc.* v. *City of Los Angeles*, 1991 WL 224528, at *6 (9th Cir. Nov. 1, 1991). The Ordinance also protects the investments of future homeowners and provides them with a measure of financial stability.

II.

Petitioners' Due Process argument fails for essentially the same reasons that their "takings" argument fails; the Ordinance does substantially advance a legitimate state interest. The Ordinance, quite simply, is a rational and legitimate response to escalating rents which threatened the welfare of current and future mobilehome owners. At the same time, the Ordinance ensures that park owners can continue to receive a just and reasonable return on their investments. As such, it clearly satisfies the requirements of substantive due process as applied to economic regulation. See, *e.g.*, *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 491 (1955).

ARGUMENT

I. ESCONDIDO'S ORDINANCE DOES NOT VIOLATE THE TAKING CLAUSE OF THE FIFTH AMENDMENT.

A. The Escondido Mobilehome Rent Protection Ordinance Does Not Effect A Permanent Physical Occupation Of Petitioners' Property.

The Fifth Amendment's requirement of just compensation when government takes private property for a public purpose has historically been viewed as an eminent domain provision. See Blackstone's Commentaries app. 305-06 (G. Tucker ed. 1803); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979); *Chicago, B. & Q. R.R.* v. *Chicago*, 166 U.S. 226, 239 (1897). With the expansion of government regulation of private economic activities, however,

the issue arose whether such regulation also constituted a "taking" within the meaning of the Fifth Amendment. Stated differently, the constitutional issue posed by state economic regulation was the extent to which the Taking Clause imposes restrictions on the government's exercise of its police powers.

In "takings" cases not involving eminent domain, the Court generally has distinguished between two forms of government action—physical occupation (which is a *per se* taking) and all other forms of economic regulation (which constitute a taking only if the regulation renders the property essentially valueless or otherwise fails substantially to serve any legitimate public purpose). Compare *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), with *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). This Court has been careful to limit the *per se* takings doctrine to cases of actual physical intrusion by the government and has never applied this doctrine to mere economic regulation. Specifically, in the area of landlord-tenant relations, this Court has held that "[s]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto*, 458 U.S. at 440; see also *Pennell* v. *City of San Jose*, 485 U.S. 1, 12 n.6 (1988) ("'statutes regulating the economic relations of landlords and tenants are not *per se* takings'") (quoting *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987)); *Block* v. *Hirsh*, 256 U.S. 135, 155 (1921) (under police power, a landlord's "property rights may be cut down, and to that extent taken, without pay").

Seeking to escape the obvious import of this Court's rent control decisions, petitioners argue that the Ordinance effects a government-authorized permanent physical occupation of their property. Thus, even though the Ordinance on its face merely regulates monopoly rents, petitioners assert that, under *Loretto*, it deprives them of a

"permanent possessory interest in their land." Brief of Petitioners at 10.

Petitioners' attempt to recast Escondido's rent regulation as a permanent physical occupation of their property is untenable. *Loretto*'s narrow holding has no application to this Ordinance which merely regulates the amount of rent park owners—who voluntarily rent their property and who are free to change the use of their property at any time—may charge. To hold otherwise would convert the heretofore useful takings concept of "physical occupation" into an utterly meaningless "metaphysical occupation" theory. Neither case law nor common sense supports this result.

Moreover, the Ordinance does not deprive petitioners of any legally recognized property interest. Stripped of petitioners' unfounded assumptions and flatly erroneous assertions, it is plain that all petitioners have lost is their ability to extract excessive rents from their homeowner-tenants—a property use the City indisputably can prohibit.

1. *Loretto*'s Narrow Holding Is Inapplicable To Legislation That Regulates The Rates Landlords Charge For Property They Voluntarily Agree To Rent.

In *Loretto*, the petitioner landlord claimed that a New York statute that required her to permit a cable television company to install cable wires and related fixtures on her property effected a taking of her property for which compensation was due. Although the cable facilities themselves were not large, "[t]he installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." 458 U.S. at 438. The state courts upheld the statute, concluding that it did not interfere with the landlord's investment-backed expectations or have an excessive economic impact on her property and that it was justified by the educational and community benefits that

cable television made possible. Accepting the validity of the asserted benefits, this Court nevertheless reversed, holding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426.

In announcing this rule, the Court drew on a series of cases involving physical intrusions on private property that "reache[d] the extreme form of a permanent physical occupation." *Id.* These intrusions included governmentally authorized permanent flooding of land (*id.* at 427-28), governmentally compelled acceptance of "permanent . . . installations [such] as telegraph and telephone lines, rails, and underground pipes or wires" (*id.* at 430), and governmentally authorized frequent, low-altitude flights that constituted a "'direct invasion of [a landowner's] domain.'" *Id.* at 431 (quoting *United States* v. *Causby*, 328 U.S. 256, 265-66 (1946)). Such permanent physical occupations, the Court explained, amounted to *per se* compensable takings because they destroyed each of the three essential rights in property: 1) the right to possess the occupied property and to exclude others; 2) the right to make nonpossessory use of the property; and 3) the right to dispose of the property. 458 U.S. at 435-36.

The Court emphasized that its holding was "very narrow," and did not call into question the "substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property." *Id.* at 441 (emphasis in original). Of particular importance here, the Court explained that its rule would not upset the "government's power to adjust landlord-tenant relationships." *Id.* at 440. Indeed, citing its decisions upholding rent control measures in *Bowles* v. *Willingham*, 321 U.S. 503 (1944), *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U.S. 242 (1922), and *Block*, the Court "affirmed that States have broad power to regulate . . . the landlord-tenant relationship . . . without paying compensation for all economic injuries that such regulation entails." *Id.* Unlike the New York statute before it, the

Court pointed out, "[i]n none of these [earlier] cases . . . did the government authorize the permanent occupation of the landlord's property *by a third party*." *Id.* (emphasis added). As long as state regulations "do not require the landlord to suffer the physical occupation of a portion of his building *by a third party*, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Id.* (emphasis added).

Notwithstanding petitioners' mantra-like insistence that this case involves a physical occupation, *Loretto*'s narrow holding has nothing to do with this case. All of the critical elements of a permanent physical occupation that this Court identified in *Loretto* are absent here. Indeed, the Escondido Ordinance, both standing alone and in conjunction with the California Mobilehome Residency Law, lacks the most fundamental of these elements—*i.e.*, governmentally *compelled* occupation. Petitioners' only complaint is that their property is being occupied *by their own homeowner-tenants*. Nothing in either the Escondido Ordinance or the California law compels park owners such as petitioners to rent their property to mobilehome owners, or prevents them from ceasing to rent their property should they wish to do so. The fact that homeowners occupy petitioners' property is a consequence of petitioners' own voluntary decision to hold their premises out for rent to the public and their subsequent decision to continue to do so.[25]

This lack of governmental compulsion is fatal to petitioners' physical occupation claim. In *Loretto* itself, this

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[25] Petitioners' oft-repeated assertion that the Escondido Ordinance confers on homeowners the right to occupy petitioners' land "in perpetuity" or "permanently" (see Brief for Petitioner at 6, 9, 11, 13, 14), is demonstrably wrong. As the City has previously explained, (*see supra* pp. 10 & n.18), petitioners may remove their property from the rental market (and thereby terminate the occupancies of their tenants) at any time they see fit, subject only to the requirements of state law (*see* Cal. Civ. Code § 798.56(g) (Deering 1990)), and other normal zoning requirements that attend any conversion in use of property.

Court took pains to point out that the constitutionally significant invasion was not the occupancy of the landlord's tenants (whom the landlord had invited onto her premises), but the intrusion by a "third party" (the cable company) who was in all respects a complete stranger to the landlord-tenant relationship, and in no respect an invitee. 458 U.S. at 439.

This Court has since explained that "[t]his element of *required acquiescence*," which lies "at the heart of the concept of occupation," is entirely lacking in the landlord-tenant relationship. *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987) (emphasis added). In *Florida Power*, the Court rejected the argument that "it is a taking under *Loretto* for a tenant invited to lease at [one] rent . . . to remain at [a different] regulated rent." *Id.* Rather, the Court explained, "it is the invitation, not the rent, that makes the difference. The line which separates [rent control] cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." *Id.* at 252-53. See also *Kaiser Aetna*, 444 U.S. at 179-80 (finding taking where government authorized third parties to use marina that owner had consistently treated as private property).

Nor does it matter that, having chosen to hold their property out for rent, petitioners' right to exclude or refrain from renting to individual homeowners is restricted. Putting aside for the moment the fact that *all* of these restrictions are imposed by a statute (the California Mobilehome Residency Law) that petitioners have not even challenged in this litigation,[26] this Court's cases make it clear that, when owners open their property to the public or hold it out for public accommodation, their previously unfettered discretion to exclude others must yield to the State's authority to prevent social and economic evils such as discrimination or unfair competitive gain. Thus, in *Loretto* itself, the Court approved, as fully consistent with its permanent physical occupation holding,

[26] *See infra* pp. 29-30.

decisions upholding statutes that restricted landlords' rights to exclude tenants who continue to occupy rented premises beyond the expiration of their leases (see 458 U.S. at 440 (citing *Block* and *Edgar A. Levy Leasing Co.*)), or that prevent property owners from excluding individuals on the basis of race, gender, or national origin from the owners' places of public accommodation. *Id.* (citing *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964));[27] see also *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 82-85 (1980) (state constitution may require private shopping center to permit political expression on its premises). More recently, this Court has dismissed for want of a substantial federal question challenges brought under the Taking Clause to statutes, like the California law here, that required park owners to permit mobilehomes to remain on-site after sale. See *Eamiello* v. *Liberty Mobile Home Sales, Inc.*, 546 A.2d 805 (Conn. 1988), *appeal dismissed*, 489 U.S. 1002 (1989); *Thompson* v. *Merlino Enters., Inc.*, 545 A.2d 1094 (Conn. 1988), *appeal dismissed*, 488 U.S. 1024 (1989).

This Court's cases make clear that the essential right to exclude others inheres only in "property *reserved by its owner for private use*." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (emphasis added). Here, petitioners have not reserved their property for private use, but instead have held it out to the general public for rent. They remain free, moreover, to reclaim their right to exclude by removing their property from

[27] Petitioners and their supporting *amici* make much of this Court's observation in *Loretto* that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. This comment, however, can only be understood as referring to physical occupations by third parties who are not tenants. This is clear not only from the Court's repeated references to third party occupations in the text (*see id.* at 440), but by its further explanation, in the very footnote petitioners cite, that "[t]he right of a property owner to exclude *a stranger's* physical occupation of his land cannot be so easily manipulated." *Id.* at 439 n.17 (emphasis added).

the rental market. Unless and until they do so, any loss of that right is attributable to their own choices, not to any compulsion by Escondido.[28]

Similarly, Escondido has not stripped petitioners of their right "to control the use of the[ir] property" or to make "nonpossessory use of the property." *Loretto*, 458 U.S. at 436. On the contrary, petitioners are currently obtaining income from their property by renting mobilehome spaces,[29] and they retain the authority to decide whether the property will continue to be used for this or some other purpose, subject only to state notice requirements and whatever limitations generally applicable zoning laws may impose. Cf. *United States* v. *Causby*, 328 U.S. 256, 259 (1946) (government's invasion of private property caused destruction of owner's commercial chicken farm); *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) (permanent flooding of land destroyed its usefulness); *National Bd. of YMCA* v. *United States*, 395 U.S. 85, 92 (1969) ("Ordinarily, of course, governmental occupation of private property deprives the private owner of his use of the property"). Nor has petitioners' property been so emptied of value that, as a practical matter, they cannot dispose of it. Cf. *Loretto*, 458 U.S. at 436. Petitioners remain free to sell the land as income-producing rental property or to sell it to a purchaser who wishes to make some other use of the property. Accordingly, there is absolutely no merit to petitioners' mystifying assertion that the Escondido Ordinance deprives them of "their rights to enjoy any future appreciation of their lands' value, and their rights to leave their property to their heirs." Brief for Petitioners at 18. In fact, they have lost neither of these rights.

[28] Contrary to the Ninth Circuit's suggestion in *Azul Pacifico, Inc.* v. *City of Los Angeles*, 1991 WL 224528 (9th Cir. Nov. 1, 1991), this Court did not conclude in *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 251 n.6 (1987), that restrictions on a landlord's ability to enter into or to terminate leases constitute a physical occupation. First, the Court simply reserved judgment on *Loretto*'s applicability to any future FCC order that "required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *Id.* More important, the Court's comment clearly concerned the takings implications of requiring utilities to enter or remain in the business of renting pole space, not the implications of simply regulating leases where utilities choose to offer pole space for rent. Indeed, the Court's comment was made in connection with Florida Power's allegation that it was powerless to exit the pole rental business altogether. *See id.*

[29] In light of this undisputed, and indisputable, fact, respondent is at a complete loss to understand petitioners' claim that the Ordinance has taken "their rights to receive rents." Brief for Petitioners at 18. In fact, during the pendency of this case, the Rental Review Board *increased* petitioners' rents. *See supra* p. 4 & n.5.

In short, Escondido has not "chop[ped] through [petitioners'] bundle [of property rights], taking a slice of every strand." *Loretto*, 458 U.S. at 435. Instead, the complete absence of any governmental compulsion concerning the uses to which petitioners' property is or may be put, and petitioners' extensive dominion and control over that property, demonstrate that Escondido has simply and reasonably regulated, not appropriated, petitioners' mobilehome parks. Under *Loretto*, Escondido's regulation of petitioners' rent is therefore not a *per se* taking.

2. Petitioners Have Not Been Deprived of Any Legally Protected Property Interest.

Petitioners attempt to buttress their physical occupation claim by pointing to the alleged "premium" that homeowners in rent-controlled parks are able to realize on the sale of their mobilehomes. According to petitioners, this premium reflects the value of the "property interest" that the Ordinance has taken from them and bestowed on their "tenants." This "property interest," petitioners claim, is "akin to a permanent statutory leasehold" that confers on the owner "[t]he right to occupy land permanently at below market rent." Brief for Petitioners at 14.

This contention, which has moved panels in the Third and Ninth Circuits,[30] is fundamentally flawed. The al-

[30] *See Azul Pacifico*, 1991 WL 224528; *Pinewood Estates* v. *Barnegat Township Leveling Bd.*, 898 F.2d 347 (3d Cir. 1990);

leged premium homeowners realize on the sale of mobilehomes in rent-controlled parks simply reflects the value to the purchasers of the protection the Ordinance provides against excessive rents.[31] Petitioners could not capture this alleged premium by selling an identifiably discrete interest in their property; they could only do so by charging the excessive rents that the Ordinance lawfully prohibits.[32]

a. Petitioners Have Lost No State-Recognized "Property Interest" That They Could Convey.

If, as petitioners claim, the Escondido Ordinance took an identifiable property interest from them and transferred it to their "tenants," then presumably repeal of the Ordinance would return this interest to petitioners. Indeed, petitioners claim that, "[b]ut for the Escondido Ordinance, [p]etitioners would have retained or could have sold such interests at the market price." *Id.* at 10. They are tellingly silent, however, concerning precisely how they would go about making such sales.

In fact, if Escondido repealed its Ordinance, purchasers of mobilehomes who, at present, may pay a "premium" to acquire a home that enjoys rent protection would not pay an equivalent premium to petitioners. Rather, purchasers would simply pay less to the departing homeowner for his or her mobilehome. Petitioners, in turn, would be able to capture an amount approximating the homeowner's premium by charging the new homeowner excessive rents.[33] Raising rents does not involve a sale of a separate interest in property at all but simply involves the use of property.

Thus, all that has been taken from petitioners is their ability to profit from the shortage of mobilehome spaces in Escondido and the rent leverage they possess due to the high cost of moving a "mobile" home. Cf. *Block* v. *Hirsh*, 256 U.S. 135, 157 (1921) (upholding law providing "reasonable rent" while depriving landlords of opportunity to "profit[] by the sudden influx of people to Washington"). This is not an interest that petitioners could "sell" on the open market in any meaningful sense of that phrase. Rather, it is an economic advantage that they derived from the *use* of their property and is therefore fairly regulated by the City.

b. The Premium Petitioners Seek To Capture Is Nothing More Than The Unfair Profits The Escondido Ordinance Legitimately Denies Them.

Even assuming the Escondido Ordinance, operating in conjunction with the eviction protections of the California Mobilehome Residency Law, divests petitioners of a discrete and marketable property interest—and respondent submits that it plainly does not—this interest is simply not one protected by the Taking Clause. This Court has explained that

> not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.

Hall v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert denied*, 485 U.S. 940 (1988).

[31] *See, e.g., Casella* v. *City of Morgan Hill*, 230 Cal. App.3d 43, 54, 280 Cal. Rptr. 876 (Cal. Ct. App. 1991) (increase in sales price may simply reflect artificially low price caused by excessive rents charged prior to enactment of rent control), *petition for cert. filed*, No. 91-361 (Oct. 15, 1991).

[32] Petitioners' assertion that the Ordinance allows "tenants" to rent mobilehome spaces at "below market rent" (*see* Brief for Petitioners at 9) misleadingly assumes that the rental rates prevailing in Escondido before the Ordinance were the product of an open and competitive market. In fact, just the opposite was true: scarcity of available spaces and the immobility of mobilehomes enabled park owners to charge excessive rents.

[33] In the absence of the Mobilehome Residency Law, park owners could also capture all or part of the premium in two other ways: by forcing departing homeowners to pay an exit fee in exchange for the owner's acceptance of the purchasing tenant or by forcing new homeowners to pay an entrance fee. Indeed, these practices were common before California prohibited them.

Kaiser Aetna v. *United States*, 444 U.S. 164, 178 (1979) (quoting *United States* v. *Willow River Co.*, 324 U.S. 499, 502 (1945)); see also *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003 (1984) ("intangible property rights *protected by state law* are deserving of the protection of the Taking Clause") (emphasis added). Far from enjoying the backing and protection of state law, the "economic advantage" for which petitioners seek just compensation is an advantage state law may legitimately prohibit.

By limiting the grounds upon which park owners can terminate or refuse to enter into space leases, and by regulating the rents owners can charge for such leases, the California and Escondido laws are designed to prevent petitioners from extracting monopolistic rents that the shortage of mobilehome rental spaces and the immobility of mobilehomes themselves would otherwise make possible. There can be no serious dispute that the desire to extract such rents is not an economic advantage which "ha[s] the law back of it." *Kaiser Aetna*, 444 U.S. at 178. Indeed, state and federal codes abound with statutes designed to protect consumers from monopolistic pricing. Moreover, such pricing is made possible here in part by zoning laws in which petitioners have no legally protected interest. See *Eamiello*, 546 A.2d at 820 (state that created site value by regulatory scarcity (zoning) can constitutionally grant sales premium to homeowner rather than park owner).

The mere fact that departing homeowners may be able to realize a monetary benefit from a restriction on a park owner's ability to charge excessive rents does not convert that restriction into a physical occupation of petitioners' property or an appropriation of a legally protected property interest. Takings are measured in terms of the property owner's loss, not the government's (or its beneficiaries') gain. *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 635 (1961); *Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189, 195 (1910). Here, the "interest" petitioners have lost—the right to use their property to profit from a shortage of mobilehome rental

spaces and the high cost of moving—is simply not a legally protected interest, and hence its loss is not compensable as a *per se* taking under the Fifth Amendment. For purposes of determining whether a physical occupation has occurred, therefore, the homeowner's alleged ability to "monetize" a benefit created by Escondido's regulation of rental rates is simply irrelevant.

3. This Court Should Not Expand *Loretto*'s Narrow Holding to Encompass Economic Regulation Of Property Voluntarily Held Out For Rent.

This Court has consistently rejected imaginative efforts to recast state and federal regulatory measures as physical occupations for which compensation is automatically due. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.8 (1989); *Florida Power*, 480 U.S. at 250-53; *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 221-24 (1986); see also *Nollan*, 483 U.S. at 841 (analyzing zoning permit condition that required "the actual conveyance of property" as regulatory taking). This case demonstrates the importance and wisdom of maintaining a clear line of demarcation between permanent physical occupations on the one hand, and nonpossessory governmental activity that affects the value of property on the other hand. Petitioners are at obvious pains to portray their claim as a narrow one: they insist that they are not challenging rent controls generally (see Brief for Petitioners at 7, 10); and, to further disguise the sweep of their legal theory, they have not challenged the California law that clearly undergirds their physical occupation claim. The enormous expansion of *Loretto* that acceptance of their claim would work, however, cannot be so easily concealed.

Petitioners' claim depends vitally on the eviction protections that California law affords mobilehome residents. Without these restrictions on petitioners' ability to terminate or refuse to enter into leases, absolutely none of the supposed "appropriation" of petitioners' property could occur. There are numerous such restrictions imposed by state and municipal laws throughout the country, as well

as by various federal laws that limit the rights of owners generally, and landlords in particular, to exclude others from their property. See Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 Rutgers L. Rev. 723, 833 (1983) (citing examples of typical "good cause" eviction laws). If this Court sustains petitioners' physical occupation claim here, it opens all of these laws and a variety of others[34] to challenge under the Taking Clause, and casts doubt on the heretofore unquestioned authority of states to regulate the terms and conditions under which property can be held out to the public.

The line between such laws and those that effect permanent physical occupations is clear. States may not compel owners to open "property reserved . . . for private use" to the general public (*Nollan*, 483 U.S. at 831); to require owners, as a condition of the right to rent property, to permit physical occupations by non-tenant, third party strangers (*Loretto*, 458 U.S. at 439 n.17); or, arguably, to require owners to continue to make their property available for rental use once they begin to do so. *Florida Power*, 480 U.S. at 251 n.6; but cf. *Fresh Pond Shopping Ctr.* v. *Callahan*, 464 U.S. 875 (1983) (dismissing for want of substantial federal question challenge brought to statute that effectively prevented owner from removing property from rental market).[35] Once owners cross this line and voluntarily hold their property out for rent, however, states may regulate the terms and conditions upon which such owners can refuse to enter into or terminate leases, so long as the owners are permitted to earn a just and reasonable return on their investment. This Court should reaffirm this unambiguous—and appropriate—line of demarcation here.

[34] *See Brief Amici Curiae of the National Trust for Historic Preservation in the United States in Support of Respondent.*

[35] *See also Nash* v. *City of Santa Monica*, 688 P.2d 894 (Cal. 1984) (no substantial federal question raised by requirement that pre-demolition removal permit be obtained before landlord could remove rental units from housing market), *appeal dismissed*, 470 U.S. 1046 (1985).

What makes the petitioners' argument to eliminate the bright-line standard for physical occupation particularly pernicious is the *per se* consequence that flows from that label. Instead of being able to demonstrate that a particular regulation was either justified by important governmental interests or that the impact on the property was not significant, the only question will be what compensation is just. Compare *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987). This Court has steadfastly and wisely refused to expand the use of a *per se* approach in reviewing government regulation under the Taking Clause. Petitioners have presented no compelling argument for why it should abandon that course now. To the extent the Court concludes that the Fifth Amendment's protections against takings have received a crabbed interpretation, the solution is not to expand what constitutes a physical occupation but rather to relax the standards for what constitutes a regulatory taking under *Penn Central*. For the reasons discussed below, the latter issue is not before the Court in this case and, in any event, Escondido's regulatory scheme in no way goes "too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

4. Any Unconstitutional Restrictions On Petitioners' Rights Result From The Operation Of The California Mobilehome Residency Law, Not The Escondido Ordinance.

Finally, petitioners' "physical occupation" claim against the City of Escondido must fail for the simple reason that it is the California Mobilehome Residency Law, not the Escondido Ordinance, that restricts a park owner's right to evict homeowners and to select the next homeowner to occupy the spaces he holds out for rent. The Escondido Ordinance merely regulates rents—it does not in any way restrict other rights of park owners.[36] Thus,

[36] Petitioners' implication that the Escondido Ordinance itself restricts the rights of park owners to exclude or refrain from renting to individual homeowners does not withstand scrutiny. On

if petitioners' property has been occupied, it has been occupied by the State, not the City. Accordingly, the State should have been named as a defendant in this suit and the State should pay whatever compensation is warranted if this Court were to hold that petitioners' property has been taken.[37]

B. The Escondido Mobilehome Rent Protection Ordinance Does Not Effect A Regulatory Taking Of Petitioners' Property.

Implicitly acknowledging the untenable nature of their physical occupation claim, petitioners in their brief to this Court argue for the first time that the Escondido Ordinance is a compensable—indeed, an impermissible—regulatory taking of their property. This

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its face the termination provisions in the Ordinance apply only to those relatively few tenancies which are "not subject to the provisions of the Mobilehome Residency Law" (*see* Ordinance § 6; JA 28-29), *i.e.*, subleases of mobilehomes from homeowners (rarely permitted by park owners) or rental of mobilehomes owned directly by the park owner. In neither case is the "tenant" a "homeowner" and therefore the Ordinance's restrictions cannot give rise to the alleged premium obtained by "homeowners" on the sale of their mobile homes.

[37] Petitioners' "physical occupation" claim may also be unripe. Petitioners argue that among the bundle of rights constituting the "permanent possessory interest" that the Ordinance purportedly transfers to their "tenants" are "the right to pay a rent below market rent in perpetuity," and "the right effectively to set and collect the next tenant's rent by charging a premium on the sale of the mobilehome coach." Brief for Petitioners at 9-10. The magnitude, and indeed the very existence, of these "rights" apparently depends on the level of rent that petitioners are permitted to charge. Hence petitioners' claims that these "rights" have been taken would seem to be premature until the level of rent has been established by the Rental Review Board. *See Pennell* v. *City of San Jose*, 485 U.S. 1, 11 n.5 (1988) (declining to address appellants' contention that combination of lower rents and restrictions on landlord's power to evict tenants contained in San Jose ordinance amounted to physical occupation of landlords' property, stating that this contention too "is premised on a hearing officer's actually granting a lower rent to a hardship tenant"). *See infra* pp. 34-35 (discussing ripeness in connection with regulatory takings claim).

claim fails for at least three separate reasons. First, petitioners are precluded from raising a "regulatory taking" challenge in this Court. They did not raise or litigate a facial regulatory taking claim below and they cannot now rely on such a claim as a ground for reversal. Moreover, having completely failed to avail themselves of the procedure for obtaining rent increases, any "as applied" regulatory taking claim they might raise is plainly unripe. Second, even if a facial claim is properly before this Court, it necessarily fails because petitioners have not been deprived of all economic use of their property. Third, the Escondido Ordinance does substantially advance several legitimate state interests and thus easily passes muster under *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987).

1. Petitioners' Regulatory Taking Claim Is Not Properly Before This Court.

Petitioners claim that the Escondido Ordinance has taken their property "under the criteria of *Penn Central*" because the "economic effect of [the Ordinance], as well as [its] interference with distinct, investment-backed expectations . . . [is] severe." Brief for Petitioners at 17. It is elemental that, in reviewing decisions of state courts, this Court lacks jurisdiction to decide federal questions that were neither litigated nor decided below. *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-39 (1969). Because petitioners never made any attempt to litigate a *Penn Central*, or "regulatory taking," challenge below, and because the state courts did not address such a challenge, petitioners are precluded from raising this alternative claim here. Moreover, because petitioners did not seek rent increases from the Rental Review Board prior to instituting this suit, their regulatory taking claim is unripe. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985).

a. Petitioners' *Penn Central* Claim Was Neither Litigated Nor Decided Below.

In their submission to this Court, petitioners describe the allegations of their complaint as "indistinguishable from the claims sustained in *Hall* v. *Santa Barbara*[,] *Pinewood Estates* v. *Barnegat Township Leveling Bd.*[,] and . . . *Azul Pacifico, Inc.* v. *Los Angeles*." Brief for Petitioners at 5-6 (citations omitted). The claims in all of these cases were predicated on a physical occupation theory. Indeed, petitioners accurately describe their claim as alleging "that the Escondido Ordinance, operating in conjunction with the California Mobilehome Residency Law, transfers to their tenants a valuable possessory interest in the realty, akin to a [statutory] leasehold, without compensation." *Id.*[38]

In connection with their taking claim, moreover, petitioners argued below only that the Ninth Circuit's decision in *Hall* should be given controlling effect (see Appellants' Opening Brief at 5-12) and that the Ordinance effected a taking of their right "to enter into a long-term lease at a reduced rate with an incoming tenant" and thereby enabled the outgoing tenant "to appropriate the entire appreciated value of the pad on which his mobilehome is located." *Id.* at 14. In connection with this *Hall*-based physical occupation claim, they cited *Penn Central* only once—for the proposition that taking claims generally entail *ad hoc* factual inquiries. *Id.*

In addition, a facial regulatory taking challenge requires a credible allegation that the law in question "denies an owner economically viable use of his land." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480

[38] While their complaint makes a single passing reference to a deprivation of "all use and occupancy of [their] property" (Complaint ¶ 6; JA 3), petitioners do not suggest that they intended this cryptic assertion to raise either a "facial" or an "as applied" regulatory taking challenge, or that they pursued either such claim below. Indeed, respondent's motion to strike this allegation was granted (Pet. App. C43-44), and petitioners did not appeal that order. *See* Notice of Appeal, JA 35.

U.S. 470, 495 (1987) (citations and internal quotation marks omitted). Petitioners, however, expressly disavowed such an effect here, arguing instead that the "[g]overnment *need not* deprive an owner of all use of his property to infringe the just compensation clause of the Fifth Amendment." Appellant's Opening Brief at 13. This argument only make sense if petitioners were asserting a *per se* taking claim.

Not surprisingly, given petitioners' exclusive reliance on the physical occupation theory espoused in *Hall*, the Court of Appeal did not discuss any regulatory taking claim or *Penn Central*'s multifactor test. Instead, the Court of Appeal's opinion is devoted almost entirely to a discussion of why *Hall* was wrongly decided. See Pet. App. A15-27. Moreover, in their petition to this Court, petitioners focused exclusively on their *Hall* claim. Thus, noting that "[t]wo federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant . . . constitute[s] an impermissible taking," they posed only the question whether it was error "for the state appellate court to disregard the[se] rulings and hold that there was no taking under the fifth and fourteenth amendments[.]" Pet. i.

Under these circumstances, this Court lacks jurisdiction to hear any regulatory taking challenge petitioners now proffer. Petitioners did not litigate any such challenge below and thus failed to afford the state courts an opportunity to address the constitutionality of the Ordinance in light of such a challenge. See *Cardinale*, 394 U.S. at 439. In addition, they failed to present the *Penn Central* issue in their petition to this Court; indeed *Penn Central* was nowhere cited in their petition for *certiorari*. See Supreme Court Rule 14.1(a) ("[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court"). Accordingly, this Court cannot entertain petitioners' regulatory taking claim.

b. Petitioners' Regulatory Taking Claim Is Unripe.

In *Williamson County Regional Planning Comm'n*, 473 U.S. 172, this Court held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Accordingly, this Court determined that Hamilton Bank's claim under 42 U.S.C. § 1983 that the Williamson Planning Commission had "taken" its property without just compensation through the application of certain zoning laws was "premature" because the Bank had failed to seek a variance prior to instituting suit. *Id.* at 186-88.

This Court explained that "takings" claims are premature until the government has taken final action because, prior to that time, the government may correct any constitutional improprieties in its regulatory scheme. "'If [property owners] were to seek administrative relief under [the procedures provided by the State], a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions.'" *Id.* at 187 (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981)). Moreover, this Court stated that it

> consistently has indicated that among the factors of particular significance in [a takings] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. . . . Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular [property] in question.

Id. at 190-91 (citations omitted).

Since *Williamson*, this Court has on at least two occasions declined to address the merits of "takings" claims

in cases in which the government had not yet reached a final decision concerning the application of its regulations to the property at issue. In *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), appellants contended that San Jose's rent control ordinance, which allowed a hearing officer to consider the "hardship to a tenant" when determining whether to approve a proposed rent increase, was *facially* unconstitutional. This Court declared the claim premature because San Jose had made no authoritative determination as to how the regulations would be applied, *i.e.*, "there [was] simply no evidence that the 'tenant hardship clause' ha[d] in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance." *Id.* at 9-10. Stressing the importance of addressing Taking Clause challenges only in concrete factual contexts, the Court added that

> we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary.' *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981).

Id. at 10. See also *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 349-50 (1986).

Prior to this lawsuit, petitioners did not seek a rent increase from the Rental Review Board, and thus no final decision concerning the application of the rent control Ordinance to petitioners' property is before this Court. By failing to seek relief in the manner provided by the Ordinance, petitioners failed to provide the City with an opportunity to negotiate an agreement—*viz.*, an acceptable rent increase—that might obviate any perceived constitutional deficiencies in the City's rent control scheme. Moreover, without knowing what rents the City will permit petitioners to charge, this Court can do no more than speculate about the economic impact—if any—of the Ordinance on petitioners' property or the extent to

which it interferes—if at all—with petitioners' investment-backed expectations. Consequently, petitioners' *Penn Central* challenge is entirely unripe.

2. Petitioners' Regulatory Taking Claim Is In Any Event Meritless.

Even if petitioners' regulatory taking claim were otherwise properly before this Court, the claim is entirely without merit. On its face,[39] the Ordinance does not deprive petitioners of all economically viable use of their property. There can be no serious dispute, moreover, that the Ordinance substantially advances Escondido's legitimate goal of protecting the many current and future mobilehome tenants whose well-being would otherwise be threatened by uncontrolled rent increases.

a. Escondido's Ordinance Does Not Deprive Petitioners Of All Economic Use Of Their Property.

" 'The test to be applied in considering [a] facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land." ' " *Keystone*, 480 U.S. at 495 (quoting *Hodel*, 452 U.S. at 295-96 (quoting *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980))). While any litigant would "face an uphill battle in making a facial attack" on legislation (*id.*), petitioners' assault clearly has no merit. Indeed, as the Court of Appeal noted, because petitioners "never alleg[d] [that] the Escondido ordinance . . . denies them fair and reasonable rents[,]" it must be "assume[d that] the rents provided for by the ordinance are fair." Pet. App. A14. Compare *Keystone*, 480 U.S. at 496 ("petitioners have never claimed that their mining operations . . . have been unprofitable since the [law under challenge] was passed"). On these facts, petitioners' facial challenge must be rejected as a matter of law.

[39] Because, as just noted, petitioners did not seek a rent increase before instituting this litigation, in this section the City addresses only petitioners' facial *Penn Central* challenge.

Petitioners nevertheless contend that the Ordinance deprives them of their rights to receive rents from, or to realize appreciation in, their property, as well as their right to bequeath their property to their heirs. Brief for Petitioners at 18. However, petitioners can and do receive rents from their property; they can possess it by withdrawing it from the rental market; they can realize any appreciation in their property by selling it;[40] and they can pass it to their heirs either as mobilehome rental property or, if they withdraw it from the rental market first, as property unencumbered by any homeowner protection restrictions. See *supra* p. 10.

Petitioners' claim can only be understood, therefore, as referring to the rights they have allegedly lost in the discrete "property interest" that they claim the Ordinance has taken from them and transferred to their homeowner-tenants. But that is not a separate, legally protected interest in property. Rather, it is only the right to use property to extract the excessive rents that Escondido's mobilehome space shortage and the immobility of mobilehomes otherwise make possible.

Even assuming, however, that the right to use their property in this manner was a discrete and legally protected "property interest," their facial regulatory takings claim still fails. As this Court has explained:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole*.

Keystone, 480 U.S. at 497 (quoting *Penn Central*, 438 U.S. at 130-31) (emphasis in original). Thus, "where an

[40] Petitioners' implication that mobilehome parks subject to rent control do not appreciate is patently false. See Los Angeles Study at iv ("[m]obile home park values have risen substantially since owners' purchase").

owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.* (internal citation omitted). This standard entirely undermines petitioners' facial challenge: they are continuing to rent their property (and in fact the Yee petitioners have obtained rent increases for both of their parks),[41] and remain free to sell their property (and in fact other petitioners did sell one park) or put it to alternative uses should they wish to do so.

b. On Its Face, The Ordinance Substantially Advances Legitimate State Interests.

Relying on *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), petitioners argue that Escondido's Ordinance effects a compensable taking because it fails substantially to advance a legitimate governmental interest. According to petitioners, departing homeowners are able to capture the full value of the rent protection in the premium that attaches to their mobilehomes. Thus, subsequent purchasers receive no protection from the Ordinance at all, because they pay controlled rents plus a sales premium which equals "the capitalized value of the difference between controlled rent and market rent." Brief for Petitioners at 27. As a result, petitioners conclude, "[t]he only goal accomplished by the Ordinance is a one-time wealth transfer from property owners to tenants in residence at the time of the election in June 1988." *Id.* In fact, the Ordinance substantially advances the City's legitimate interest in protecting *both* current *and* future homeowners. Either interest, standing alone, is sufficient

[41] Petitioners' suggestion that the controlled rents they receive "decline in constant dollars because of inflation" (Brief for Petitioners at 20) and that the resulting decline in the value of their property "is progressive and permanent" (*id.* at 22) simply ignores the fact that they can obtain rent increases and have in fact done so. Indeed, one of the factors the Rental Review Board *must* weigh when considering a rent increase application is any "[c]hange[] in the Consumer Price Index for All Urban Consumers in San Diego Metropolitan Area." Ordinance § 4(g)(1); JA 26.

to sustain the Ordinance. Petitioners' contention that future homeowners will not benefit from the Ordinance is thus both incorrect and irrelevant as a matter of law.

i. Escondido's Ordinance Protects Current Homeowners From Excessive Rent Increases And Protects The Investment In Their Homes.

The Ordinance substantially advances Escondido's perfectly legitimate goal of protecting *current* homeowners from escalating rent increases. As discussed, because of the complementary relationship between space rents and the value of mobilehomes, these homeowners have a significant investment in their homes that is jeopardized by a park owner's unfettered discretion to increase rents. As the Ninth Circuit recognized, the close nexus between the state's entirely permissible interest in protecting the investments of current homeowners and the legislative means chosen to accomplish it is sufficient, standing alone, to dispose of the *Nollan* challenge that petitioners advance. See *Azul Pacifico* v. *City of Los Angeles*, 1991 WL 224528, at *6 (9th Cir. Nov. 1, 1991) ("the ordinance does protect existing tenants from being forced to sell their coaches at distress sale prices in the event the landlords were to set rents for new tenants so high that no one would want to buy the coach"). That purpose, by itself, is sufficient to sustain the statute.

Petitioners nevertheless insist that the Ordinance is unconstitutional because it sweeps too broadly. Arguing that the danger of untoward rent increases whenever a mobilehome is sold is "illusory," petitioners contend that Escondido can have no interest in preventing these increases, and thus must provide for "decontrol" at the time the home is sold.

At the outset, it is important to recognize the unwarranted degree of judicial intrusion into state legislative judgments that petitioners' expansive view of *Nollan* entails. Petitioners implicitly acknowledge that regulating rents *during* the period a homeowner remains in a mobilehome substantially advances the City's legitimate

interests. Brief for Petitioners at 26-28. They cannot and do not deny, moreover, that the Ordinance permits park owners to seek rent increases at the time of a mobilehome's sale or at any other time a park owner believes an increase is warranted.[42] Reduced to its essentials, therefore, petitioners' *Nollan* argument boils down to the proposition that the Federal Constitution *requires* states to permit unrestricted rent increases whenever a mobilehome owner sells his home on site, and *forbids* states from authorizing rent increases on a case-by-case basis. The City submits that *Nollan* cannot and should not be read to incorporate into taking jurisprudence the strict scrutiny and least restrictive alternative standards upon which petitioners' claim necessarily depends.

Certainly the voters of Escondido could reasonably conclude that mobilehome park owners could do more harm to the public interest by charging excessive rents to essentially captive homeowners than individual homeowners could do by requesting excessive prices for their homes. In any event, the choice of solutions belongs to the City. The decision whether to regulate the buyer-seller relationship is a legislative choice with which the courts should not interfere. Nothing authorizes this Court to substitute its judgment for that of the City as to how best to protect current homeowners' significant investment in their homes and to protect mobilehome living as an affordable housing option.

ii. The Ordinance Protects Future Homeowners From Excessive Rent Increases And Will Protect Their Mobilehome Investments.

Even if the constitutionality of the Ordinance did turn on the narrow question of whether it benefits *future*

[42] Although petitioners imply in their Complaint that the Ordinance resulted in a "fixed reduced rent" (Complaint ¶ 8; JA 4), after the above language was stricken by the Court Order granting Motion to Strike, etc., Pet. App. C43-44, petitioners never appealed from that portion of the Order. *See* Notice of Appeal, JA 35.

homeowners, the Ordinance would withstand scrutiny under the *Nollan* standard because it substantially advances the City's interest in protecting these individuals. The Ordinance protects these homeowners, just as it protects current homeowners, by preventing park owners from exercising unfettered control over rents. Future homeowners, no less than current homeowners, might—in the absence of rent protection—be "forced to sell their coaches at distress sale prices" (*Azul Pacifico*, 1991 WL 224528, at *6), and the City has a legitimate interest in protecting the investments that these homeowners make.

In addition, the Ordinance provides future homeowners a less obvious, but ultimately no less important benefit—a significant degree of financial stability. Many mobilehome homeowners are either senior citizens living on fixed incomes or young families struggling to pay for their first home. See *supra* p. 6. In either case, they need protection against excessive rent increases. In the absence of rent protection, such purchasers would have no way of planning for potentially exorbitant rent increases that could wreak havoc with their budgets and destroy the value of their investments in their homes.[43]

[43] In arguing that only current homeowners benefit from the Ordinance because the alleged "premium" paid by the future homeowners exactly equals their savings in rent (Brief for Petitioners at 27), petitioners ignore these two benefits that the Ordinance clearly does afford future homeowners. Moreover, petitioners' assumption that current homeowners can extract the full value of future rent savings is questionable at best. At the time of sale, uncertainty about a number of factors—not the least of which would be the number and size of future Board-approved rent increases—would make an accurate calculation of future rent savings virtually impossible. In addition, petitioners' theory assumes that individual homeowners have sufficient market power to extract a "premium" from future purchasers.

II. THE ESCONDIDO ORDINANCE DOES NOT DEPRIVE PETITIONERS OF THEIR RIGHTS TO SUBSTANTIVE DUE PROCESS.

This Court long ago abandoned reliance on the "vague contours"[44] of substantive due process to invalidate a state's regulation of economic activities within its borders. The doctrine of cases such as *Lochner* v. *New York*, 198 U.S. 45 (1905)—"that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963). Decisions on the wisdom of laws are for those elected to pass laws; the courts "do not sit as a superlegislature" to reweigh those decisions in their own scales of justice. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). As Justice Black wrote in *Ferguson*, "[w]hether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes"—or George Stigler, James Buchanan, John Kenneth Galbraith or any other economist, for that matter—"is no concern of ours." 372 U.S. at 732. Instead, this Court's role properly is a limited one: it reviews state economic regulation only to ensure that it is rationally related to a legitimate state end. See, *e.g.*, *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 491 (1955).

Reaching back to the 1890's for their substantive due process standard, and relying on essentially the same arguments they make in connection with their *Nollan* challenge, petitioners claim that the Escondido Ordinance is not reasonably necessary to achieve its goal of protecting homeowners from oppressive rents. Because the Ordinance fulfills that goal and also advances the City's legitimate interest in protecting homeowners' significant investments, it necessarily follows that petitioners' substantive due process claim fails.

As this Court recently explained, "[t]he standard for determining whether a state price-control regulation is

[44] *See Adkins* v. *Children's Hosp.*, 261 U.S. 525, 567-68 (1923) (Holmes, J., dissenting).

constitutional under the Due Process Clause is well established: Price control is unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." *Pennell* v. *City of San Jose*, 485 U.S. 1, 11 (1988) (internal citations omitted). The Escondido Ordinance plainly passes muster under this highly deferential standard.[45]

A. Escondido's Response To The Problems Of Excessive Rents By Mobilehome Park Owners Was Legitimate And Reasonable.

The immobility of mobilehomes allows park owners to hold their homeowners' significant capital investments hostage: unable to move their homes, homeowners must accept rent increases or abandon their investments. If rents become too high, the homeowners may sell their mobilehomes, but a home sold subject to high rents has little market value, and the homeowners cannot recover the value of the home.[46]

These problems are not merely theoretical. In Escondido, mobilehome owners were subjected to a series of rent increases prior to enactment of Proposition K. These increases posed a significant threat to the health and welfare of these residents, many of whom live on fixed incomes and can pay higher housing costs only by foregoing other necessities, such as food and medical care. In addition, these increases threatened to destroy the value of the tenants' mobilehomes. Indeed, the City expressly found that, when, in response to the Ordinance, park owners forced homeowners to sign long-term leases that exempted their rental spaces from rent protections,

[45] This Court has consistently reviewed legislative enactments and voter-approved measures under the same standard. *See, e.g., Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 295 (1981); *Lucas* v. *Forty-Fourth Gen. Assembly*, 377 U.S. 713, 737 (1964).

[46] Even critics of rent control measures recognize that, because of the investments homeowners make in their mobilehomes, park owners are able to extract additional compensation, above and beyond traditional rent. *See supra* note 15.

homeowners who needed to sell in order to relocate for new jobs were unable to do so.[47]

Escondido responded to the economic and social problems created by scarcity and the high cost of moving a mobilehome in a reasonable and responsible manner. At first, the City channelled disputes over rent increases to a private mobilehome dispute resolution forum administered by representatives of the affected groups. When this accord process proved unsuccessful, the City adopted an Ordinance that protects mobilehome owners but simultaneously preserves the park owners' ability to obtain a reasonable return on their property. See *supra* pp. 11-12.

The Ordinance rolls rents for mobilehome spaces back to the levels that existed in 1986 (before park owners instituted a series of increases in anticipation of a rent control measure) and requires that park owners obtain the approval of a rent board before increasing rents in the future. Ordinance § 3; JA 23. These measures plainly serve the legislation's permissible objective of protecting a vulnerable segment of the population from predatory rental practices. The Ordinance eliminates the park owners' ability unilaterally to destroy the value of the homeowners' substantial investments in their mobilehomes and to appropriate the value of those investments through higher rents. As a result, the Ordinance alleviates the economic and social hardships (such as a reduced ability to meet essential needs and the inability to sell a mobilehome should the need arise) that the park owners' economic power could cause and had caused.

The Ordinance, however, does not pursue this entirely legitimate public purpose at the complete expense of mobilehome park owners; rather, it affords owners a number of procedural and substantive protections. Thus, park owners are authorized to file "rent increase application[s] for one or more mobilehome spaces" (Ordinance § 4(a); JA 24), and the Ordinance places no limits on the number or timing of such applications.[48] The Ordinance directs the Rent Review Board to approve "just, fair and reasonable" rent increases, and sets forth 11 factors—including changes in the consumer price index, the rent charged in other parks in the City, and all reasonable costs associated with owning, operating and maintaining the park—that the Board must consider in making that determination. *Id.* at § 4(g)(1)-(11); JA 25-27. In addition, the Board may weigh "any other factors it considers relevant" to the determination of a just and reasonable rent (*id.* at § 4(g); JA 25), and park owners are entitled to a hearing at which they may offer "any testimony that is relevant to the requested rent increase." *Id.* at § 4(f), JA 25.[49] These provisions ensure that park owners can seek and obtain a just and reasonable return on their property.

Finally, the Ordinance does not constitute Escondido's sole response to the problems associated with a lack of affordable housing in general, or the problems that mobilehome owners face in particular. The City has spent substantial sums in rent subsidies and first-time homebuyer assistance. In addition, it has committed $16 million in city funds to a program designed to purchase mobilehome parks from their owners at fair market value and convert them to home ownership. To this end, Escondido has acquired nearly one-tenth of the rental spaces in the City, including 209 spaces in one of petitioners' parks.

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[47] *See* Escondido Ordinance 88-50; JA 33.

[48] Petitioners misleadingly claim that the Ordinance prohibits rent increase applications whenever a home is sold. *See* Brief for Petitioners at 7 (petitioners "challenge those provisions of the Escondido Ordinance that prevent rent adjustments when mobilehome coaches are sold in place"). Nothing in the Ordinance, however, prohibits

[49] In addition, Escondido's rent application forms invite owners to "list additional reasons [they] wish the Board to consider" on their applications. *See* Rent Review Application at 1.

B. The Ordinance Is A Constitutionally Legitimate Exercise Of The City's Police Power.

Petitioners' contention that this regulatory response to a pressing social problem is arbitrary and capricious, and does not reasonably advance the City's legitimate interets, is untenable. This Court has consistently upheld legislation that "prevent[s] excessive and unreasonable rent increases caused by [a] growing shortage of and increasing demand for housing . . . [as] . . . legitimate exercise[s] of [the] police powers." *Pennell*, 485 U.S. at 12 (internal quotation marks and citations omitted). Thus, it has sustained federal and state enactments that, in response to housing shortages, granted administrative agencies authority to review and modify rental terms in individual leases (*Block* v. *Hirsh*, 256 U.S. 135 (1921)) or to roll back and establish reasonable rents on an area-wide basis (*Bowles* v. *Willingham*, 321 U.S. 503 (1944)), as well as statutes that permitted holdover tenancies upon payment of a reasonable rent (*Marcus Brown Holding Co.* v. *Feldman*, 256 U.S. 170 (1921)) or that allowed tenants to resist enforcement of leases on the ground that the rents called for were unjust or unreasonable. *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U.S. 242 (1922). In each case, the Court recognized that, where the federal or state legislature had properly deemed rental conditions a matter of public concern, it could legitimately regulate the rents charged for rental property. See *Block*, 256 U.S. at 157 ("if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since [the 1877 decision in] *Munn* v. *Illinois*, 94 U.S. 113").[50]

[50] Petitioners attempt to brush aside this line of authority by suggesting that the Court approved the challenged rent controls only as temporary measures necessitated by war or its aftermath. See Brief for Petitioners at 19 n.5. This Court, however, has consistently cited the decisions in *Bowles* and *Block* as establishing, without qualification, the states' "broad power" to regulate landlord-tenant relationships. *See Pennell*, 485 U.S. at 12 & n.6; *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987); *Loretto*, 458 U.S. at 440. Moreover, the rent control cases were decided at a time when this Court subjected legislative judgments concerning the wisdom of regulatory measures to more exacting scrutiny than is employed today and nevertheless upheld them. *See Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483 (1955). The emergency nature of the rent control measures, while relevant in the pre-*Williamson* era decisions, is of no continuing constitutional significance now.

The fact that such rate regulation may adversely affect landlords does not render it impermissible.

> Price control, the same as other forms of regulation, may reduce the value of the property regulated. . . . A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power.

Bowles, 321 U.S. at 517-18. Nor does such regulation run afoul of the constitutional injunction that bars the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Where a housing shortage enables property owners to charge excessive rents, "the owners reap unique benefits from the situation that causes . . . economic hardship, and in that respect singling them out to relieve [that hardship] may not be regarded as 'unfair.'" *Pennell*, 485 U.S. at 20 (Scalia, J., dissenting); see also *id.* at 22 ("Singling out landlords . . . may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem"); *Block*, 256 U.S. at 157 (noting that it was "unjust [for landlords] to pursue . . . profits from" a housing shortage).

The renting of mobilehome spaces in Escondido is "clothed . . . with a public interest" sufficient to bring that activity within the scope of the City's broad police power. A shortage of mobilehome rental spaces, combined with the immobility of mobilehomes, allowed park owners to charge excessive rents that, in turn, caused or threat-

ened a number of social and economic hardships. The City then properly corrected the problem by preventing park owners from preying on relatively weaker homeowners. That is a choice that the Constitution permits the City to make.[51]

---

[51] Similarly without merit is petitioners' suggestion that they were entitled to test at a trial the validity of the City's belief that unrestrained rent increases threatened the welfare of mobilehome owners. The series of rent increases that prompted the initiative drive, as well as the series of increases that followed initial efforts to enact the Ordinance, afforded the City an ample basis for concluding that park owners would, if unregulated, raise rents to potentially harmful levels. Nor was the City required to find that "unscrupulous landlords" would raise rents so much between tenancies "that incumbent [tenants would be] unable to find buyers." Brief for Petitioners at 33. Rather, it was enough for the City to conclude that automatic rent increases upon vacancies would lead to unfair prices—a conclusion that plainly had a substantial basis. *See supra* pp. 43-47. Because the City is free to defend its economic regulation on any conceivable basis, no purpose would be served by a trial on these undisputed, legislative facts. *See City of New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976); *Lee Optical, Inc.*, 348 U.S. at 490-91.

CONCLUSION

The decision of the Court of Appeal should be affirmed.

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ON WRIT OF CERTIORARI
TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE,
COURT OF APPEAL FOR THE STATE OF CALIFORNIA

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

INTRODUCTION

Petitioners' opening brief demonstrated that: (1) the City of Escondido has taken Petitioners' property by physical occupation or, in the alternative, under the criteria laid down in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), by an oppressive deprivation of protected property rights; (2) the transfer of Petitioners' property rights to their tenants does not advance any legitimate governmental interest; and (3) Escondido's Ordinance deprives Petitioners of their property without due process of law. Escondido has rebutted none of this.

More importantly, the City has no good answer for the basic question: what do people buy when they pay a $20,000 or $30,000 premium for a used mobilehome in an Escondido

mobilehome park? According to the City, they buy "the protection [of] the Ordinance." Brief for Respondent at 24. In other words, they buy the rights created by the Ordinance.[1] As Petitioners' brief showed, the rights the Ordinance transferred are: (1) the right to occupy the property in perpetuity; (2) the right to pay a rent below market rent in perpetuity; (3) the right to select the next tenant to occupy the property; (4) the right to effectively set and collect a portion of the next tenant's rent by charging a premium on the sale of the mobilehome coach; and (5) the right to sell, bequeath, or let pass by intestacy all of these rights. The "protection of the Ordinance" is Respondent's euphemism for leasehold interests that the City has carved out of Petitioners' property and awarded to the tenants. That is what the incoming tenant pays a premium for. The City's euphemism cannot disguise an uncompensated taking. Brief for Respondent at 24.

The City attempts to divert attention from the legal inadequacies of its position by relying on pages of factual allegations. These are irrelevant since the City asks the Court to affirm a dismissal on the pleadings. Few of these assertions are germane to the constitutional issues before the Court. Most are outside the record. All can be refuted at trial. Petitioners briefly address only some of the more egregious assertions.

History of Operating Losses in the Yees' Parks

Escondido asserts there is no taking because Petitioners receive reasonable rents. Rents have little relevance in taking cases (except as an indication of value in assessing

[1]Leaseholds cannot be taken without just compensation. *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

damages), and the Yees are not, in any event, predators but ordinary business people whose controlled revenues are insufficient to pay their property's expenses.[2] None of the litany of alleged abuses has any bearing on the constitutional issue: does Escondido's Ordinance appropriate interests in the Petitioners' property? Abusive practices can be and are regulated through other laws that do not appropriate interests in the realty.

The Mobilehome Rental Market in Escondido Is Not a Monopoly.

"Monopoly," "monopoly rents," and "monopoly power" echo through the City's Brief like a refrain as the justification for Escondido's Ordinance, but Escondido's twenty-nine mobilehome parks (let alone California's 5,800 mobilehome parks)[3] are no monopoly. Economists define monopoly as a single supplier, such as an electric utility, of a product or service for which there is no ready substitute. PAUL A. SAMUELSON, ECONOMICS (13th ed. 1989). Where people can choose from dozens of mobilehome parks, buy or rent a house or condominium, or rent an apartment, there is no monopoly; and no park owner can exercise monopoly power by restricting

[2]*See* Administrative Record in *Yee v. Mobilehome Park Rental Review Board*, No. N-51754 (San Diego Super. Ct. filed June 13, 1991). The Yees are experiencing an annual net operating loss (excluding depreciation of $291,000) of approximately $84,000 *with* the rent increase allowed by Escondido's rent board. (A.R. 325, 345). That rents increased in the 1970s and the 1980s proves nothing. At the same time housing prices were soaring eight-fold from $23,000 to $200,000 median price (San Diego Economic Bulletin, Vol. 39, No. 11, November 1991), and rent increases under the circumstances were entirely predictable. When property is taken, just compensation must be paid, whether the owner's remaining property is profitable, breaks even, or loses money.

[3]Brief for Respondent at 5, n.7.

supplies in order to increase prices. *See Azul Pacifico v. City of Los Angeles*, 948 F.2d 575, 582 (9th Cir. 1991) (rejecting similar arguments). When demand temporarily outruns supply, rents will rise and attract new investment, (but for "slow growth" policies or local rent controls that deter development) and new development will tend to depress rents toward equilibrium levels. What the City labels "monopoly" is just the normal interplay of supply and demand in a competitive market. Since the Constitution protects all property — even that of "monopolists" — Petitioners doubt the constitutional significance of these issues, but market conditions are issues of fact. If they matter as much as the City suggests, let them be proved or disproved at trial.

The Purchase Price Paid For a Coach is a Questionable Investment and Its Remaining Value is a Factual Issue

The City claims that vacancy controls protect the residents' "investment."[4] Nowhere do they attempt to separate the value of the coach itself (which is depreciable personal property, worth only its Blue Book value)[5] from the premium paid for the "protection" of the Ordinance (*i.e.*, for the bargain leasehold it creates). At trial, Petitioners will establish that

[4]The City argues that rent increases can be substituted for vacancy decontrol. The Complaint states that premiums are approximately $40,000, requiring $400 per month rent increases. The City to date has granted rent increases of $4 to $27.50 to park owners. *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board*, No. N-54104 (San Diego Super. Ct. December 24, 1991); *Yee v. Mobilehome Park Rental Review Board, supra*.

[5]Coaches are typically financed and secured as personal property under California Commercial Code §§ 9102, 9202(3)(b),(4) and California Vehicle Code §§ 6301-6302.

under rent control the residents' "investment" consists of the value of the coach, which depreciates rapidly, and the value of the interests appropriated by the Ordinance. In other words, the City would protect the appropriated "investment" in the park owner's property. In *Azul Pacifico, supra*, Mrs. Morrison paid $77,000 for an absolutely worthless coach. 948 F.2d at 578. To protect the tenant's "investment" in a worthless coach, the Ordinance in *Azul Pacifico* had the effect of transferring a $77,000 estate in the land to the tenant.[6]

Seeking Rent Increases at Time of Sale is Not a Realistic Alternative

The City then argues that owners may "seek rent increases at the time of a mobilehome's sale." Brief for Respondent at 40. The City would have the Court believe that whenever a resident lists his coach for sale, the owner need only apply to the Mobilehome Rent Review Board (the same City Council that filed criminal charges against most of these Petitioners weeks after this Court granted *certiorari*) for an appropriate increase.[7] It taxes credulity to suggest that after

[6]The average coach cost $21,800 in 1985. The Kelley Blue Book shows a 50% decline in value in ten years from the first number quoted (which is less than a new price). Kelley Blue Book, Mobilehome Guide, 1980-82. Ninety-six percent of California coaches are at least ten years old and 60% are twenty to thirty years old and practically worthless on resale. Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*,35 UCLA L. REV. 399, 402 n.6, 463 (1988).

[7]The charges involve rent increases at resale under long term leases that Petitioners believe to be exempt from local rent controls. *People v. Charles E. Dupont*, San Diego Municipal Court No. E031733 (filed Nov. 27, 1991); *People v. Olen Mercer*, San Diego Municipal Court No. E031734 (filed Nov. 27, 1991); *People v. George Mekjian*, San Diego Municipal Court No. E031735 (filed Nov. 27, 1991); *People v. Richard C. Keubler*, San Diego Municipal Court No. E031736 (filed Nov. 27, 1991); *People v. John Yee*, San Diego Municipal Court No. E031738 (filed Nov. 27, 1991).

three years of litigation in six courts, the City would now allow significant increases at resale.[8]

I. THE ESCONDIDO ORDINANCE HAS TAKEN PETITIONERS' PROPERTY BY PHYSICAL OCCUPATION

"You can dramatically increase the value of your homes."[9]

Mobilehome rent control advocates recognized that the passage of the Ordinance (not the continued existence of the State Mobilehome Park Residency Law) was the critical event which created the valuable, tranferable estate, and for good reason: The Ordinance not only guarantees below market rent but precludes the park owner from terminating tenancies or refusing to renew tenancies with existing tenants and refusing to grant tenancies to prospective purchasers. (Ordinance Section 6, Ordinance No. 88-50, Section 2). This constitutes "required acquiescence [which] is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987).

The local Ordinance has to be considered in tandem with State law. The *Pinewood Estates v. Barnegat Township Leveling Bd.*, 898 F.2d 347 (3d Cir. 1990) and *Azul Pacifico* Courts of Appeal are in accord, and as the district court said in *Azul Pacifico*, to do otherwise would create a constitutional loophole

[8]In practice, after rolling rents back two and a half years, Escondido's rent board has allowed increases of as little as $4 per space per month, *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board, City of Escondido*, No. N-54104 (San Diego Super. Ct. filed Dec. 24, 1991); *Carefree Ranch, Ltd. v. Mobilehome Park Rental Review Board, City of Escondido, appeal docketed*, 4th Dist. Civil No. DO14142 (Cal. Ct. App. March 26, 1991). At $4 per space per month, an owner would recover the application fee in sixteen years.

[9]Election handbills for Proposition K.

where different levels of government cooperating with each other could achieve an unconstitutional result without liability. *Azul Pacifico v. City of Los Angeles*, 740 F. Supp. 772, 776 (1990), *aff'd in pertinent part*, 948 F.2d 575 (9th Cir. 1991). Passage of the Escondido Ordinance was the critical element in the taking.[10]

Escondido's attempted reliance on *Florida Power* collides with the Court's express refusal there to reach the issue at hand in the case — the situation where a lessor who has voluntarily invited one tenant onto his property is required "to enter into, renew, or refrain from terminating" the tenancy. *Florida Power*, 480 U.S. 245, 252 n.6. Petitioners invited their initial tenants onto the property, but it is by governmental fiat, not by voluntary choice, that they must allow in successor tenants, who have bought the right to such tenancies from prior tenants with hard cash. The City apparently concedes that an Ordinance requiring owners to continue to make their property available for rental use once they begin to do so may be a physical occupation. Brief of Respondent at 28 (citing *Florida Power*).

Further, the Ordinance effects a transfer of appreciation in the land from the park owner to the tenant, where the tenant is free to immediately realize its value by way of sale and defeats the purpose of rent control: preserving low and moderate income housing opportunities.[11] (This is unlike a

[10]*See Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 878 (1983) (Rehnquist, J., dissenting).

[11]While the City erroneously contends that "all Petitioners have lost is their ability to extract excessive rents from their homeowner tenants" (Brief for Respondent at 17), they studiously avoid the fact that the Ordinance allows departing tenants to extract "excessive rents" — presumably market rents — from incoming tenants. The City's citations to *Eamiello v. Liberty Mobilehome Sales, Inc.*, 208 Conn. 620, 546 A.2d 805 (1988), *appeal dismissed*, 489 U.S. 1002 (1989); and *Thompson v.*

(cont'd)

typical rent regulation which, by merely regulating the rents for existing tenants, simply diminishes the value of the property in question and thus serves the purpose of preserving low and moderate income housing opportunities.) The value of the underlying real property remains the same, but the Escondido Ordinance effects an outright transfer of a part of the property to the selling tenant. This transfer (rather than mere diminution in value) implicates the power of eminent domain and compels just compensation.[12] "This linchpin . . . is the principle that an exercise of eminent domain always invokes a *transfer* of property." William B. Stoebuck, *Police Power, Takings, and Due Process, et al.*, 37 WASH. L. REV., 1056, 1084 (1980).

Escondido resorts to an arid legal formalism, arguing that there is no established "state-recognized property interest" corresponding to that which has been taken from Petitioners and given to incumbent tenants. A property interest compensable under the Takings Clause is "that value which is capable of transfer from owner to owner and thus of exchange for some equivalent." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

The right to control occupancy, *i.e.*, the right to exclude, is protected under the Fifth Amendment. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In addition, since an asset's earnings are "incidents of ownership," just as the asset

Merlino Enterprises, Inc., 208 Conn. 656, 545 A.2d 1094 (1988)(per curiam), *appeal dismissed*, 488 U.S. 1024 (1989) are inapposite. These were not rent control cases. 208 Conn. at 649, 546 A.2d at 820. A marketable estate in land had not been created on behalf of the tenants. Rather, the landlord at any time was free to capture any placement value by raising rents without restriction. A Fifth Amendment violation did not take place because the park owner was free to obtain just compensation through the normal operation of the market.

[12]Here, the rights taken from the owner have not disappeared (like Penn Central's right to build an office tower).

itself is property, the right to collect rents, which is transferred by the statute from landlord to tenant, enjoys constitutional protection. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).[13]

The *Hall* trial court (after remand from the Court of Appeals), held that Mrs. Hall could have sold the same right to occupy at a reduced rate and the tenant would enjoy the added security of permanence of that right. *Hall v. City of Santa Barbara*, No. 85-5838, Memorandum of Decision at 15 (C.D. Cal. filed June 18, 1989).

The forced occupancy described above,[14] as well as the uncompensated transfer of an interest in title, constitutes a *per se* taking.[15]

The City would have the Court believe that the Petitioners, or their successors, can readily convert their mobilehome parks to other uses. If this were true, it would avail the City nothing, for the Court rejected the same argument in *Loretto*

[13]The interest transferred by the Ordinance under California law is an estate in real property, defined by Cal. Civ. Code § 14 to be coextensive with "lands, tenements and hereditaments." Hereditaments include lands, tenements and all interests which would pass to heirs, and includes incorporeal hereditaments such as rents. *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788 (1935).

[14]Assuming the industry average of 11% move-outs per year (Hirsch & Hirsch, *supra*, at 418 n.58), approximately 40% of present tenants in Petitioners' parks are there without invitation and as a result of compulsion.

[15]While not determinative, *Block v. Hirsch*, 256 U.S. 135 (1921), *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) and *Bowles v. Willingham*, 321 U.S. 503 (1944) involved the application of temporary rent controls, enacted in wartime or its aftermath, that did not compel owners to offer accommodations for rent, or to accept incoming tenants. As Justice Rehnquist noted in his dissent in *Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 878 (1983): "[T]he very fact that there is no foreseeable end to the emergency takes this case outside the Court's holding in *Block v. Hirsch*. We reserved judgment as to whether such a regulatory scheme would be constitutional if it were made part of a permanent scheme."

v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 n.17 (1982):

> [T]he landlord could avoid the requirements of [the New York cable television law] by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation . . . .[16]

II. THE REGULATORY TAKINGS CLAIM IS RIPE AND MERITORIOUS

The regulatory takings claim is advanced under two rubrics: that the Ordinance does not substantially advance a legitimate governmental interest (*Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)), and the *Penn Central* ad hoc analysis. Escondido oversimplifies takings analysis, as if it were simply a choice between two categories of virtual *per se* cases. Governmental measures are either literal physical occupations and *per se* takings under *Loretto;* or they cannot be takings unless they deprive property of substantially all useful value (the first prong of *Agins v. City of Tiburon*, 447 U.S. 255 (1980)), or impose confiscatory returns. There is, according

[16]In reality, conversion presents a kind of gauntlet. State law requires notices to residents and preparation of an impact report. Cal. Civ. Code § 798.56(f), Cal. Gov't Code §§ 65863.7, 66427. Local governments may, and often do, condition approvals upon payment of relocation benefits, or even purchase of used mobilehome coaches at "in-place value" (*i.e.*, including the leasehold interests created by rent control). Depending upon the new use proposed and applicable zoning, conversion may require preparation and certification of an environmental impact report under the California Environmental Quality Act (Cal. Pub. Res. Code § 21000 *et seq.*); a change in zoning (Cal. Gov't Code § 65853 *et seq.*); amendments to the local general plan (Cal. Gov't Code §§ 65358, 65860); and approval of a subdivision may under the Subdivision Map Act (Cal. Gov't Code § 66410 *et seq.*). These are discretionary approvals, entrusted to elected officials or their nominees, and in Escondido, to the same City Council members who sit on Escondido's Mobilehome Park Rental Review Board. The process is slow, uncertain and expensive.

to the City, no middle ground of analysis. If this were the law, most of what this Court has written about takings would have been entirely unnecessary. *Penn Central* could have been decided in a single sentence, for there was no contention there of either a physical occupation or a total deprivation of value.

From Day One of the operation of the Ordinance Petitioners have had a takings claim because the rights that command a premium passed to the incumbent residents. *Azul Pacifico, supra; DeAnza Properties X v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991) The only question which remains is the amount of compensation to which they are entitled. The *raison d'être* of rent control is to keep rents below market levels. The Ordinance itself rolls back rents two and a half years and contains an elaborate, time consuming rent reduction oriented process. On its face the Ordinance permits a decision to be rendered in 210 days — in the *Yee* case the application was submitted on June 2, 1989, and a decision was not rendered until December 6, 1990, approximately 550 days later.[17]

Under the *Penn Central* test,[18] given that tenants can determine the identity of the incoming tenant, set the rental rate

[17]*Yee v. Mobilehome Park Rental Review Board, supra* n.2, Administrative Record at 2, 424.

[18]Contrary to the City's assertions, Petitioners argued *Penn Central* below. Brief for Appellants before California Court of Appeal at 14; Petition for Review to California Supreme Court at 21. Even if they had not preserved the issue — which is an alternative legal theory in support of the basic taking claim, not a separate claim for relief — so long as an argument is "so connected with [the question presented] in substance as to form but another ground or reason for alleging the invalidity of the lower court's judgment . . ." it can be considered. *Illinois v. Gates*, 462 U.S. 213, 220 (1983) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899)). This Court's rules permit consideration of subsidiary questions. "The statement of any question presented [in the Petition for Certiorari] will be deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14.1(a).

for occupancy, and sell that right from the onset of the Ordinance, the Ordinance interferes with Petitioners' use, possession and disposition for the reasons set forth in the Petitioners' opening brief. Equally, the tenants can capture appreciated value from and after January 1, 1986, thus confirming the existence of a massive economic impact, and interference with investment-backed expectations. The only remaining question is the amount by which damages are offset by the minimal rent increases allowed by Escondido.

III. THE ORDINANCE DOES NOT SUBSTANTIALLY ADVANCE A LEGITIMATE GOVERNMENTAL PURPOSE

The "premium" received by the tenant disables the Ordinance from substantially advancing a legitimate governmental purpose in that it in fact permits departing tenants to effectively impose rent increases at market levels and does not serve the purpose of preserving low and moderate housing opportunities, nor does it satisfy the requirement that it closely fit the purpose of protecting the tenant's questionable investment.

CONCLUSION

For these reasons, the judgment of the California Court of Appeal should be reversed with instructions to remand these consolidated cases for trial.

DATED: January 14, 1992

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1991

JOHN K. YEE and IRENE S. YEE, et al.,

Petitioners,

v.

CITY OF ESCONDIDO,

Respondents.

On Appeal From The California Court of Appeal

BRIEF AMICUS CURIAE OF WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS[1]

The Western Mobilehome Association is a nonprofit organization formed in 1945 to promote the interests of mobilehome park owners, operators, and residents in California through the sponsorship of educational programs, the collection and dissemination of information and publications of interest to mobilehome park owners and tenants, and by participation in the legislative and judicial process when the interests of the membership is at stake. It has approximately 2000 members who provide

[1] This brief is submitted with the written consent of all parties filed with the Clerk of the Court.

the public with approximately 225,000 mobilehome rental spaces.

The Western Mobilehome Association and its members are vitally concerned with the Court's determination of this case. Many of its members own mobilehome parks in cities and counties which impose controls on the rents which can be charged; about half of these jurisdictions also prevent an owner from increasing the mobilehome pad rent when the mobilehome is sold, or limit the increased rent to less than market rates. (We refer to such provisions as "vacancy control" provisions.) These rent and vacancy control provisions compel the owner to rent his space to mobilehome purchasers for less than market rates, decreasing his income, diminishing the value of his property, and discouraging him from investing in that property. Several members of the association have filed suits challenging local vacancy control provisions, which cases await the Court's decision in the present case.

If this Court holds that vacancy control provisions do not constitute a taking without just compensation, and do not deny owners due process of law, we have no doubt that many more communities will enact vacancy control. We can foresee a future in which most of our members are locked into investments in which the rents they can charge fall further and further behind market rates each year, while their tenants sell their mobilehomes for premium prices which include the possessory value of a rent-controlled pad in the owner's park.

SUMMARY OF ARGUMENT

This case involves the question whether vacancy control ordinances for mobilehome parks may constitute either a taking of property without just compensation, or a violation of substantive due process. We hope to assist the Court in deciding that question by (a) summarizing the characteristics of the mobilehome business, (b) explaining the matrix of state laws and local regulation from which this case arises, (c) explaining the economic

theory which forms the basis for the concept that the sale of a mobilehome at a premium price under vacancy control represents a taking of a property interest of the park owner, and (d) showing that in practice mobilehomes in vacancy control jurisdictions do sell for such a premium.

From this analysis we draw three contentions: First, we contend that requiring a park owner to rent to persons whom he has not selected and does not approve is a taking by physical invasion of his rights of possession and exclusion, and that vacancy control laws, by denying him just compensation for that taking, render that taking unconstitutional. Second, we contend that the vacancy control provision should also be found unconstitutional if measured against the standards for a regulatory taking, because it does not advance a legitimate state purpose of providing low and secure rents, but only the illegitimate purpose of taking property from the owner for the benefit of those tenants owning mobilehomes at the time of its enactment. Third, because the ordinance fails to serve a legitimate purpose, we believe a trial court could find that it lacks the rationality required by the Due Process Clause.

ARGUMENT

I. CHARACTERISTICS OF THE MOBILEHOME PARK BUSINESS

The use of mobilehomes as residences began in earnest after World War II, and increased during the 1950's and 1960's. (Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 *UCLA L. Rev.* 399, 403 (1988) (hereinafter cited as Hirsch & Hirsch)). The units were originally travel trailers that could readily be moved from park to park. *Id.* But during the 1960's and 1970's, when most California mobilehome parks were established (*see California Department of Housing and Community Development, A Survey of Mobilehome Park Owners Pursuant to SB*

1835, at 1 (1986)) (hereinafter Survey), trailers were replaced by larger units which "are akin to pre-fabricated or manufactured housing in that they are seldom, if ever, removed." Hirsch & Hirsch, *supra*, at 403. Relocating a mobilehome from one park to another is a complex process which costs in the range of $1000-$3000. Hirsch & Hirsch, *supra*, at 404-405. As Judge Kozinski noted in *Azul Pacifico, Inc v. City of Los Angeles*, 91 Daily Journal D.A.R. 13599 (9th Cir. Nov. 1, 1991) "The mobile homes themselves really aren't: Moving a coach is a substantial and expensive undertaking."

Most mobilehomes – from 90 to 95 percent – are owned by the tenants. Hirsch & Hirsch, *supra*, at 405. The tenants themselves fall into two groups: young families seeking low-cost housing, and senior citizens. *Id.* at 414. Nationally 41 percent of mobilehome park residents are 50 years or older and 26 percent are retired; in California 76 percent are 50 or older and 56 percent retired. *Foremost Insurance Group, Manufactured Housing Outlook for 1991*. For both young families and older persons, the purchase of a mobilehome may enable the purchaser to acquire a residence at a cost which is typically less than the cost of renting a similarly sized and outfitted apartment.

When the tenant wants to move out, he or she will generally sell the mobilehome, not remove it from the park. Thus mobilehomes remain in place for years and are passed from tenant to tenant. Less than 1 percent are ever moved. Hirsch & Hirsch, *supra*, at 405. In contrast, about 11 percent of the tenants move every year. Survey, *supra*, at 17.

These unique circumstances in the mobilehome business make it easy for a mobilehome park tenant to profit from the sale of a site in a mobilehome park through selling his coach at an inflated price. *See* McAllister, *Hall v. City of Santa Barbara: A New Look at California Rent Controls and the Takings Clause*, 17 Ecology L.Q. 179, 208

(1990). If the park is not subject to vacancy control, however, the profit is a limited one. It represents, in essence, the value to the new tenant of saving the cost of transporting and installing his mobilehome on an empty pad. But with rent control and vacancy control, the profit also includes the value to the new tenant of renting a pad at below market rents, plus the opportunity to sell the mobilehome when he or she leaves at a price which reflects the possessory value of the rent-controlled pad.

Apartment dwellers generally lack a similar opportunity to sell the right to a rent-controlled apartment.[2] Although one hears occasionally of tenants exacting "finders fees" or "key money" from their successors (*see* McAllister, *supra*, at 208-210), generally the tenant whose tenancy is terminating owns nothing which the new tenant must acquire to move in. Apartment rental would be analogous to mobilehome rental only if tenants generally own something, such as a refrigerator, which a new tenant must acquire in order to move into a rent-controlled apartment. If that were the case, ownership of a used refrigerator, worth perhaps $600 new and now worth one-third that, might confer the right to rent an apartment indefinitely for $400 a month less than free market rents. (The buyer could also anticipate that future rent increases would be proportionately less than the increase in market rents, so the discrepancy between controlled rents and free markets rents would increase.) Such a refrigerator is worth much more than $200; in terms of the savings in rent alone, it is worth more like $20,000. Furthermore, it is worth as much to the next purchaser (even though the refrigerator as an appliance continues to depreciate), so the buyer can expect that if he leaves the

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[2] "In the apartment context, unless the jurisdiction allows the tenant to sublet his apartment without rent restrictions, tenants are unable to appropriate the economic benefit of lower rents caused by rent controls. In contrast, tenants in mobile home parks can appropriate the placement values, or at least a large part thereof." Hirsch & Hirsch, *supra*, at 448.

apartment he can sell the refrigerator for about what he paid for it, or more. So it may be worth approximately $30,000, depending on how long the buyer expects to stay in the apartment. At this point it is obvious that what is being sold is not only, or primarily, a refrigerator, but instead the right to rent and occupy the apartment.

This, as we will explain, is the situation in the mobilehome business. Here the present tenant does own something – the mobilehome itself – which the prospective tenant must acquire to get a rent-controlled space in the mobilehome park. Thus the transaction between present tenant and future tenant is more than the sale of a mobilehome; it is largely (sometimes entirely) the sale of the right to rent and occupy a pad in the mobilehome park. As explained in *Pinewood Estates v. Barnegat Tp. Leveling Board*, 898 F.2d 347, 353 (1990):

> the purchaser of a mobile home who pays a premium for the right to keep the home in a mobile home park pays for the cost of the tenancy rather than for the mobile home. Thus, the premium is nothing more than rent for the pad which, depending upon whether the purchase is financed or paid for in cash, the new tenant pays during his tenancy or in advance.

We maintain that this right to occupy a space in the owner's mobilehome park is a species of property in the nature of a leasehold, that it is the property of the park owner, not the present tenants, and that laws which transfer that right to the tenants take the property of the owner.

II. REGULATION OF MOBILEHOME PARKS IN CALIFORNIA

A. State Regulation.

Mobilehome parks in California are regulated by the California Mobilehome Residency Law, Cal. Civ. Code §§ 798-798.8. The law gives all tenants, even those renting

on a month-to-month basis, a permanent tenancy during good behavior. It does so by providing in § 798.55(b), that "The management shall not terminate or refuse to renew a tenancy" except for the reasons specified in the act. These reasons all require proof of some misconduct by the tenant, such as failure to pay rent, failure to comply with park regulations after due notice, or conviction of a crime committed on the park premises.

The Mobilehome Residency Act further gives the tenant the right to transfer the right to occupy the coach pad to the purchaser of the mobilehome. Section 798.73 provides that "The management shall not require the removal of a mobilehome from the park in the event of its sale to a third party during the term of the homeowner's rental agreement".[3] (Since under § 798.55 the park owner must renew a tenancy on request, the implied permission to require its removal after the rental term expires is meaningless.) Section 798.78 grants similar rights to the heirs, joint tenants, or personal representatives of a deceased tenant; § 798.79 grants such rights to a foreclosing legal owner or junior lienholder.[4]

Thus under the California Mobilehome Residency Law:

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[3] Under § 798.74, the park owner may not withhold approval of a mobilehome purchase "if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park."

[4] In the terminology used in California practice, the senior lienholder would generally be considered to be the "legal owner." (The purchaser of the mobilehome is the "equitable owner.") Thus § 798.79, by granting rights to the legal owner or junior lienholder, grants such rights to all persons who have liens on the mobilehome.

(a) a tenant may remain on a mobilehome park site indefinitely despite the expiration of his tenancy;

(b) a tenant may sell his mobilehome and require the park owner to enter into a landlord-tenant relationship with the buyer;

(c) a lender may foreclose upon a mobilehome, sell it to a third party, and require the park owner to enter into a landlord-tenant relationship with the third party; and

(d) the heirs of a tenant may sell the mobilehome to a third party and require the park owner to enter into a landlord-tenant relationship with the third party.

The California Mobilehome Residency Law, however, does not impose rent or vacancy control. Under that law, a park owner may, and often is, compelled to rent to persons not of his choosing, and for a term not of his choosing, but he is permitted to charge them the fair rental value of the leasehold. The state law, however, forms the backdrop for local rent control ordinances. Local rent and vacancy control laws may prohibit eviction of tenants without good cause, or require park owners to renew leases automatically – as the Escondido ordinance does here (Escondido, Cal., Ordinance 8850 (1988)) – but they do not need to do so because such restrictions are supplied by state law.

B. Local Regulation.

Eighty-seven local jurisdictions in California impose rent control.[5] Most limit rent control to mobilehome parks; only 13 also control apartment rents. A total of 1203 parks, with 126,848 pads, are subject to rent control. These represent about 22 percent of the mobilehome parks in California, but about 34 percent of the spaces,

[5] The figures in this paragraph are based upon an updated version of the chart in Hirsch & Hirsch, *supra*, at 408-411.

since many of the unregulated parks are quite small parks located in rural counties.

Thirty-four of those eighty-seven jurisdictions also prohibit the park owner from raising rents to market value when a mobilehome is sold.[6] This percentage has declined in the last few years as a result of the decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988), which led local governments to fear that vacancy control provisions would expose them to liability for a taking of property rights.[7] Some jurisdictions that prohibit a park owner from charging market rents to the purchaser of a mobilehome may, however, permit the tenant to lease his coach – thus subleasing the pad – at market rates.

[6] The *United States Department of Housing and Urban Development, Report to Congress on Rent Control*, at 9 (1991), states that "The most severe ordinances now in place in the United States allow for rent increases that are well below inflation and do not permit vacancy decontrol." But while this type of ordinance may be unusual for apartment rent control, it is common for mobilehome park rent control in California.

[7] The City of San Jose has a unique ordinance. (San Jose, Cal., Municipal Code, ch. 17.22 (1989)). In explicit response to the decision of the Ninth Circuit in *Hall v. City of Santa Barbara*, *supra*, it suspends vacancy control until the City Attorney certifies that such provisions do not constitute a compensable taking. If the city attorney so certifies, the vacancy control provision takes effect retroactively. Any park owner who raised the rent to a new owner by more than 8 percent during the period when vacancy control is suspended must refund the full amount of the increased rent (not just the amount in excess of 8 percent) to the person who owns the mobilehome when the vacancy control provision goes into effect. The entire refund goes to the person who owns the mobilehome when the City Attorney certifies that vacancy control provisions are valid; someone who bought a mobilehome during the time when vacancy control was suspended, paid higher rents, then sold it before the suspension was lifted receives no rebate.

The rent control laws vary from place to place, but virtually all are designed to ensure that rents fall below market rates, and increase at rates less than the cost of living. About half of the ordinances permit automatic annual increases. Many link those increases to changes in the consumer price index.[8] Most of those limit the automatic increase to less than 100 percent of the change in the consumer price index, which guarantees that the park owners' return in constant dollars will decline year by year. Other laws provide for automatic increases up to fixed percentage amounts, but again the amounts are almost always less than the historic rate of inflation. About half of the ordinances require application to a rent control board for any increase. Such boards are frequently dominated by tenants' groups.[9]

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[8] A few ordinances offer alternative measures for rent increases. The City of Gilroy, for example, permits the park owner to increase rents by 5 percent or 80 percent of the change in the consumer price index, whichever is less. Gilroy, Cal., Code ch. 14A, § 14A.4. The City of Oxnard permits increases up to 75 percent of the change in the consumer price index, with a minimum increase of 3 percent and a maximum of 8 percent. Oxnard, Cal., Code ch. 17.1, art. I, § 17.1-9 (1991). Some other jurisdictions have similar formulas.

[9] Although virtually all rent control ordinances purport to guarantee the park owner a fair rate of return on investment, many deny the park owner any return on capital improvements, permitting him to recover the cost only. *See, e.g.*, Escondido, Cal., Ordinance 8850 (1988). The concept of return on capital investment, moreover, although approved as a basis for setting a fair rate of return in many cases (*see, e.g., Federal Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 599-605 (1943); *Fisher v. City of Berkeley*, 37 Cal.3d 644, 680-682, 693 P.2d 261, 290, 209 Cal.Rptr. 682, 711-712 (1984), *cert. denied* 475 U.S. 1150

(Continued on following page)

Thus a mobilehome park owner has great economic incentive to convert his land to another use, or to sell to a buyer who plans to do so. To prevent this, many rent control ordinances limit conversions, imposing conditions and requiring approval by some public board. Some of these require – or permit the board to require – the park owner to buy the mobilehomes at a price which reflects the value of occupying a rent controlled site. *See, e.g.*, Santa Cruz County, Cal., Code ch. 13.30 (1980).[10]

Under these circumstances, few would invest in new mobilehome parks. The number of spaces in California mobilehome parks increased by 32.6 percent from 1970-1975, when there was no rent control, by 8.37 percent in 1975-1980 when rent control began, and by only 0.6 percent in 1980-1985. *Report of the California Assembly Committee on Housing and Community Development on SB 1241* (1989). Hirsch & Hirsch, writing in 1988, report that "virtually no new mobile home parks are being developed in California and the sale of existing parks is anything but robust." Hirsch & Hirsch, *supra*, at 417.

To encourage establishment of new mobilehome parks, the 1989 California Legislature enacted Civil Code

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(1986)), may not provide a fair rate of return for California mobilehome rents. Real estate values increased tremendously in California during the 1970's and 1980's. As a result, a rent which seems to represent a reasonable rate of return on the original investment for a park established in the 1960's may yield a return on current market value of less than 1 percent. With land devoted to most other uses earning a reasonable return on current market value, the mobilehome park owner under rent and vacancy control finds himself holding an investment of steadily diminishing value.

[10] An alternative device to prevent conversion is to zone the park for mobilehome park use only. *See, e.g.*, Redwood City, Cal., Ordinances 1130.262-1130.263 (March 6, 1989).

§ 798.45, which provides that "'new construction' . . . shall be exempt from any ordinance . . . which establishes a maximum amount that a landlord may charge a tenant for rent."[11] This law amounts to legislative recognition of the impact of rent control and vacancy control on mobilehome parks.[12] It had the desired effect of increasing investment in new parks. *See Foremost Insurance Group, supra*. But it also resulted in a two-tiered price structure: the owner who establishes a park after January 1, 1990, may charge market rents, but his competitor with an older park is limited to rents which year by year fall farther behind the free market rate. The owner of the older park is, in effect, meeting a public need for low cost housing at a sacrifice not demanded of his neighbors or his competitors.

III. ECONOMIC ANALYSIS

The mobilehome market in California is not a monopoly. As explained in *Azul Pacifico, Inc. v. City of Los Angeles, supra*, at 13601:

> There are almost 400,000 mobile home spaces in the state, as well as millions of houses, apartments and other dwellings; the various modes of housing are, with various elasticities, fungible. It is inconceivable that in such a market any person or group could artificially reduce the supply of housing and thus increase its price – the conventional definition of a monopoly. [¶] In fact, the California housing market is not an

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[11] Section 798.7 defines "new construction" as "any newly constructed spaces [for mobilehomes] initially held out for rent after January 1, 1990."

[12] For an economic analysis of the effect of rent control on the supply of housing services, *see* W. Hirsch, *Law and Economics* 82-87 (2nd ed. 1988).

> example of 'market failure' at all; it reflects the operation of normal market forces. According to the law of supply and demand, the market price of a product will rise as consumers want more of it, unless the supply increases commensurately. If the price of housing in Los Angeles is high, this is simply the free market's mechanism for ensuring efficient allocation of existing housing resources and creating incentives for an increase in the supply of housing which, eventually, will drive down the price.

Although the park owner lacks power to exact monopoly profits, he can exact what the Hirsch article refers to as a "quasi-rent." As explained in that article:

> If a coach owner is confronted with a rent increase, he may decide to move his coach to a pad in a park where the rents are lower. Assuming both pads are of equal quality, an optimizing individual chooses the least costly solution. Consequently, the coach owner will move only if the present value of the expected difference in rent exceeds the costs of transporting the coach and preparing and landscaping the new site. For example, if transportation costs and the costs of making the new site identical to the present one add up to $500, then an optimizing individual would not relocate unless the present value of the expected difference in rent exceeded $500. This value of $500 is known as the quasi-rent.

Hirsch & Hirsch, *supra*, at 428.

The Hirsch article distinguishes the quasi-rent from the "placement value," the term it uses to describe the increase in value, beyond that of the quasi-rent, which a mobilehome acquires by virtue of occupying a rent-controlled site. As it explains:

> to the extent that the landlord does not have unfettered freedom to set rents, the discrepancy between contract rent and theoretical fair value

> rent will create a value to the coach being placed in a particular park. This increment of value, which is not attributable to the physical attributes of the coach, is the placement value.

Hirsch & Hirsch, *supra*, at 429.

The increased value of the mobilehome on a rent and vacancy controlled site is not a part of the tenant's equity interest in his coach. Hirsch & Hirsch, *supra*, at 430-431. It is a benefit additional to the benefit of lower, stabilized rents. Hirsch & Hirsch, *supra*, at 431. And, as the article points out, it is a one-time benefit:

> Only the tenant in possession at the time rent control is imposed will benefit from the transfer of wealth. The subsequent tenant may get the benefit of stabilized lower rents, but he pays for this benefit in the form of a higher purchase price and, therefore, higher mortgage payments. Indeed the possibility exists that after rent control subsequent mobile home tenants may be paying the same amount or more for precisely the same housing after rent control.

Hirsch & Hirsch, *supra*, at 431.

Hirsch & Hirsch undertook a study of sales of 344 coaches in 40 different cities. They concluded that "Sales prices are on average about thirty-two percent higher in communities which have imposed rent control on mobile home pads. About $8,800 would be attributable to the increased placement value due to rent control." Hirsch & Hirsch, *supra*, at 443-444.

Evidence introduced at trial of two cases supports the conclusion that mobilehomes in communities with vacancy control can be sold for a price which includes a rent control premium. The trial court in *Azul Pacifico, Inc. v. City of Los Angeles*, heard expert evidence on the existence and amount of the rent control premium:

> Plaintiff's expert William N. Kinnard, Jr. testified that if a mobile home located and intended to remain on a pad in a rent controlled park sells

> for more than a comparable home and pad located in a non-rent controlled park, this is evidence both that the landlord's property right has been transferred from the outgoing tenant to the incoming tenant and that the outgoing tenant was paid for that transferable right. Both the plaintiff's expert Robert Foreman and the defendant's expert Robert Lea testified, after accounting for all other variables, that the homes in plaintiff's park sold at prices higher than comparable homes situated in comparable non-rent controlled parks.

740 F.Supp. 772, 776 (C.D. Cal. 1990). Based upon this testimony, the court found that the property right was transferable, had a market value, and was actually traded in a market. *Id.*

On appeal, the Ninth Circuit affirmed the district court's finding that a taking had occurred. The court of appeal summarized that finding as follows:

> The value of the possessory interest transferred by operation of law from landlord to tenant is reflected in the 'premium' the tenant receives upon sale of the coach – the amount by which the sale prices of coaches in rent-controlled parks exceed those in uncontrolled areas. One Mrs. Morrison, for example, testified that she bought a coach in Azul Pacifico's park for $77,000 and immediately sold it for $5000 and had it removed from the pad. When asked why, she responded: "The use of the land was what I paid for more than the place." Trial exhibit 432 at 7. In fact, both the plaintiff's and the defendant's experts agreed that there was a substantial premium paid on coaches in rent-controlled parks – they just calculated the amount differently.

Azul Pacifico, Inc. v. City of Los Angeles, 91 Daily Journal D.A.R. 13599 (9th Cir. Nov. 1, 1991).

In the *Hall* case itself, on remand, the federal district court for the central district of California granted summary judgment for plaintiffs upon "undisputed evidence that at least 21 buyers paid more for their mobile homes because they were guaranteed a rent controlled price." *Hall v. City of Santa Barbara*, No. 84-9506, slip op. at 6 (C.D. Cal. 1989).[13]

Thus in a mobilehome setting, the existence of a rent control premium is not merely a construct of economic theory. It is a fact, and one which, when the issue actually comes to trial, is essentially undisputed.

IV. LEGAL IMPLICATION

A. Taking Issues

Recent cases, most notably *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), have drawn a distinction between physical invasions and regulatory takings. The *Loretto* decision noted that, as in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), *reh'g denied*, 439 U.S. 883 (1978):

> the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause.

Loretto v. Teleprompter Manhattan CATV Corp., supra, at 426. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* We leave to others the question whether such a distinction leading to "dramatically different results" (*Hall v. City of Santa Barbara*, 833

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[13] This unpublished opinion appears as exhibit "A" to appellants' brief before the California Court of Appeal.

F.2d 1270, 1275 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988)), is required by the Constitution and assume, for the purpose of this brief, that the Court will adhere to this distinction.

1. Taking by Physical Invasion

In a number of cases the Court has found it useful to describe ownership of real property as a "bundle" of rights. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945). "The permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking." *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 110, 542 N.E.2d 1059, 1067 (N.Y. 1989), *cert. denied*, 110 S.Ct. 500 (1989).

The provisions at issue here involve two related "sticks" from this bundle: the right to possession of the property (which includes the right to collect the rents), and the right to exclude others from the property. Cases have recognized that the taking of these sticks from the bundle is a taking of property. In *Hall v. City of Santa Barbara*, the court, speaking of the right to possess, observed that "The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause." 833 F.2d 1270, 1276, *citing United States v. Gen. Motors*, 323 U.S. 373 (1945). *Kaiser Aetna v. United States*, 444 U.S. 177, 180-181 (1979), held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."

The state Mobilehome Residency Law requires the park owner to renew leases indefinitely, thus depriving him of the right to possess the mobilehome pad at the termination of the tenancy he originally agreed to. It further requires him to accept as a tenant the person to

whom the prior tenant has sold the coach, if he has the ability to pay the rent and charges. Thus the park owner's right to exclude persons is severely curtailed, and he or she may be compelled to accept tenants they consider unsuitable.

But since the state law permits the owner to bring rents to market rates when mobilehomes are sold, it does not, standing alone, constitute a physical invasion of property *without just compensation*. The owner, by charging market rents, can obtain exactly the compensation to which he would be entitled were the state to condemn a leasehold interest in the pad. The local rent and vacancy control provisions, by requiring below market rentals, add the additional element which completes the picture of an unconstitutional taking without just compensation. Those provisions, "in conjunction with the background state law rules, operated to transfer [the park owner's] property to his tenants, thus violating the takings clause." *Azul Pacifico, Inc. v. City of Los Angeles*, 91 Daily Journal D.A.R. 13599, 13600 (9th Cir. Nov. 1, 1991). "[I]t is the fact that rents cannot be raised . . . that works the unconstitutional taking . . . , not the state law." *Azul Pacifico, Inc. v. City of Los Angeles*, 740 F. Supp. 772, 776 (C.D. Cal. 1990).

Under rent control without vacancy control, a park owner must rent to existing tenants at rates below market. But without vacancy control, the system has a measure of self-correction. Tenants for various reasons will choose to sell their coach, and the park owner can utilize the opportunity to raise the rent to market levels, so his overall income never falls a great deal behind market. *See Hall v. City of Santa Barbara, supra* 833 F.2d 1270, 1279 (9th Cir. 1986). With vacancy control, however, rents never catch up; they fall further behind market rates every year. This loss in value is appropriated by the tenant when he sells his mobilehome.

In short, the park owner's rights of possession and exclusion are so diminished that he cannot prevent the physical entry onto his land of persons to whom he

would not choose to rent, and upon terms which he would not freely accept. This is the "required acquiescence" which the Court in *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) said "is at the heart of the concept of occupation." The third circuit described it as "a physical invasion far more pronounced than that in *Loretto*." *Pinewood Estates v. Barnegat Tp. Leveling Bd.*, 898 F.2d 347, 353 (1990). Since the owner is compensated for that invasion at rates less than fair market rents, the taking violates the Fifth Amendment.[14]

In the case at bar, however, the California Court of Appeal denied that a taking of property had occurred, and argued that the increased value of mobilehomes under vacancy control was the result of market economic forces operating on "complementary goods." *Yee v. City of Escondido*, 224 Cal.App.3d 1349, 1352, 274 Cal.Rptr. 551, 553 (1990). Citing elementary economics texts, it explained that:

> [b]ecause they are used together, there is a direct and necessarily inverse relationship between the prices for complementary goods. For example, a decrease in the price of popcorn

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[14] When property is taken by physical invasion, the owner is entitled to compensation for its fair market value, not simply a reasonable return on his original investment. (This point is obvious in the case of a direct taking; if the landowner bought property at $100,000 which is now worth $500,000, and the city takes it to build a new city hall, it must pay $500,000, not $100,000 plus a reasonable return.)

Thus as Judge Kozinski explained in *Hall v. City of Santa Barbara, supra*, 833 F.2d 1270, whether the park owners can charge rents representing a fair return on investment "is not the test in cases involving a claim of taking by physical invasion . . . . " (Id. at 1281.) Even if the rental payments compensated the owner "for the use of the land during the rental period . . . . ," the owner is "entitled to additional compensation for the taking of their property: the possessory interest in the land allegedly transferred to each of their tenants." (*Id.*)

> will cause an increase in the demand for popcorn poppers. Assuming a constant supply, this in turn will result in an increase in the price of popcorn poppers. The 'complementary good' effect is basic to a free market economy.

Id. at 1352.

Mobilehomes and mobilehome pad rentals are complementary in the sense that if the rents were to fall due to free market forces, such as the opening of additional parks, the demand for mobilehomes might increase, and price of mobilehomes could be expected to rise. But the present case involves a different phenomenon, for the increase in value adheres only to mobilehomes already in place. This is the result, not of free market forces, but of laws and ordinances which artificially tie the value of the pad and the mobilehome presently occupying it by preventing the pad owner from rejecting the mobilehome buyer or charging him a fair market rent.

The Court of Appeal's theory boils down to the proposition that if wealth transfers result from economic forces, a law that alter these forces is immune from challenge under the Takings Clause. An example will show the absurdity of this approach. Suppose the state were to say that my house and my neighbor's must be sold as a package, thus making them complementary goods, which they were not before. Then it provides that the neighbor gets all the proceeds. Under the theory of complementary goods, the value of my house will plummet. Yet both the complementarity, and the transfer of wealth, are the product not of the market, but of law, and that law clearly effects a taking of property. We maintain that the state cannot be permitted to tie goods owned by different persons together, then by a scheme of unequal regulation, permit one to realize the value of the others property. This is nothing but a complicated way of taking property from one to give it to the other.

The California Court of Appeal also pointed out that in an apartment setting, the landlord still loses value

because he cannot increase the rents to market levels, but the benefit is spread among all succeeding tenants. *Yee v. City of Escondido, supra,* at 1356. It then argued that the present case is no different because, "if the owner's property is taken by the government, it is of no constitutional consequence to whom it has been given." *Yee v. City of Escondido, supra,* at 1356.

This is in essence an argument that monetization of the rent control premium is not essential; that there is just as much of a taking if the tenant cannot capture the rent control premium in the selling price of his mobilehome, so that the benefit adheres to future tenants. The fact that something can be monetized and sold demonstrates that it is property, but the Court has recognized property interests which lack these attributes. *See Roth v. Board of Education,* 408 U.S. 564 (1972). The Court of Appeal's argument may suggest that there is a taking even if the tenant cannot sell at a premium, but it in no way denigrates our claim that there is surely such a taking when the tenant can not only enjoy but sell the possessory value of a rent-controlled pad.[15]

This point is discussed by Judge Kozinski in *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1986). He notes that in none of the cases upholding rent control did the landlord claim that the tenant's right to possess the property was transferable, had a market value, and was in fact traded on the open market. *Id.* at 1278. He then goes on to observe that:

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[15] Were this not a physical invasion case, the distinction would be much simpler: one could reasonably believe that vacancy control in the apartment setting may serve a significant public purpose by making low-cost housing available to the public, but vacancy control in mobilehome parks serves no such purpose. *Loretto v. Teleprompter Manhattan CATV Corp.,* 452 U.S. 419, 426 (1982), however, teaches that a physical invasion is a taking without regard to the public interests it may serve.

> This is not a minor difference; it is crucial. The fact that the tenant can sell his interest to third parties drastically affects the economic realities of the landlord/tenant relationship. The typical rent control statute modifies the landlord/tenant relationship somewhat to protect tenants from perceived evils of the free-enterprise system. . . . By contrast, the Santa Barbara Ordinance, as it is alleged to operate, changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property.

Id. at 1279.

B. Regulatory Taking

Although we maintain that vacancy control ordinances constitute a taking of property by physical invasion, the invalidity of the ordinances can also be demonstrated under a theory of regulatory taking.

In *Penn Central Transportation Co. v. City of New York*, the Court acknowledged that it has "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S.104, 124 (1977), *reh'g denied*, 439 U.S. 883 (1978). It identified, however, "several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to

which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [Citation omitted]. So, too, is the character of the governmental action." *Id.*

The impact of the regulation upon the claimant, and his investment-backed expectation, is clear. The park owners invested in mobilehome parks expecting that they could choose their tenants (except as limited by anti-discrimination laws), that they could charge market rents, and that, if the market value of the property increased, they could capitalize on that increase either through increasing the rents to reflect the increased market value or selling the property. The effect of the rent and vacancy control laws, especially when joined to anti-conversion ordinances (see *ante*, at 11), is to lock the park owner into a permanent investment yielding below market rents.

In determining whether an ordinance constitutes a regulatory taking, Chief Justice Rehnquist, dissenting in *Penn Central Transportation Co. v. City of New York*, suggested that a critical question might be whether the ordinance imposed affirmative duties on the landowner. 438 U.S. 104, 146 (1977), *reh'g denied*, 439 U.S. 883 (1978); *see also Seawall Associates v. City of New York, supra*, at 102. In that connection it is significant that the mobile park owner is subject not only to a duty not to prevent the sale of the mobilehome at a premium price; he owes affirmative duties to admit the purchaser to the mobilehome park, to enter into a lease with him, and to maintain the facilities and perform the services required by the lease and by state law.

The second part of the test examines the character of the governmental action. *Penn Central* noted that when a state tribunal has "reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted" (438 U.S. at p. 125), the Court has generally upheld land use restrictions. The inquiry suggested by such language

is similar to that under the first part of the test contemplated by *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980): whether the ordinance substantially advances legitimate state interests.

Thus the inquiry breaks down into two components – what interests does the measure advance, and are they legitimate? The inquiry resembles that involved when the Court inquires whether an economic regulation violations the Due Process or Equal Protection clauses. But the opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), explains the crucial difference in the standards employed. In a takings case, wrote Justice Scalia, "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon*, 447 U.S. 225, 260 (1980), not that 'the State *"could rationally have decided"* that the measure adopted might achieve the State's objective.' " *Nollan v. California, supra*, at 834, fn.3.

The Escondido ordinance, being an initiative measure, lacks a statement of purpose. We presume its purpose is to prevent excessive rents arising from a shortage of rental property; that is the basis upon which California courts have upheld rent control in past cases (*see, e.g., Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 160, 550 P.2d 1001, 130 Cal.Rptr. 231), and the stated reason for most rent control ordinances in California. But the vacancy control provision of the ordinance does not further this purpose. As the court said in *Azul Pacifico, Inc. v. City of Los Angeles*, 91 Daily Journal D.A.R. 13599, 13602 (9th Cir. Nov. 1, 1991):

> The vacancy control ordinance does nothing to protect mobile home buyers from the rigors of the marketplace. Instead it transfers the value of rent-controlled space . . . from the mobile park landlord to the tenant. We are unable to see how this transfer of wealth from one group of citizens to another can serve any rational governmental purpose.

Indeed, as we have seen, the new tenant is probably worse off because of vacancy control. Instead of paying a higher rent each month, he must come up with the cash equivalent of the rent at the onset of the tenancy, and in all likelihood borrow money at interest to do so.[16]

Azul Pacifico, Inc. v. City of Los Angeles, suggested that vacancy control laws serve a different purpose – "protecting existing tenants from being forced to sell their coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach." *Id.* at 13602. But a park owner under rent control without vacancy decontrol, has no reason to discourage prospective tenants from purchasing mobilehomes in his park; he cannot increase rents until the coaches are sold. To the contrary, he will set rents for new tenants at levels calculated to encourage them to purchase mobilehomes in his park.

Tenant groups sometimes argue that park owners may threaten to charge prohibitive rents for vindictive purposes, even though this is not to their economic self-interest.[17] (Tenants' more realistic concern is that obsolescence and depreciation will greatly reduced the value of

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[16] In addition, both present and future tenants suffer from the decline in the quality of housing incident to rent control. *See* Olsen, *What do Economists Know About the Effect of Rent Control on Housing Maintenance?*, 1 The Journal of Real Estate Finance and Economics 295-307 (1988). This decline is, of course, more severe under vacancy control. *See United States Department of Housing and Urban Development, Report to Congress on Rent Control*, at 21 (1991).

[17] Tenant groups also occasionally claim that park owners threaten to charge prohibitive rents to prospective purchasers with the goal of forcing the tenant to sell his coach to the park owner. But the park owner's ability to do so is limited by the ability of the tenant to remove the coach and sell it as a unit separate from the pad. If this costs about $1000-$3000, as indicated by Hirsch & Hirsch, *supra*, at 404-405, the park owner cannot force the price down by more than this figure.

their 20-30 year old mobilehomes unless the sale of the mobilehome can be tied to a guaranteed below-market rent.) But the vacancy control ordinances are not designed to combat this danger. With rare exceptions, the ordinances, including Escondido's, do not attempt to ban only prohibitive or vindictive rates. Instead most, including Escondido's, prohibit any rent increase upon sale of the mobilehome, even though existing rents are known to be below market rates.

We submit that the fit between a goal of preventing a theoretical vindictive owner from threatening to charge rents in excess of market, and a provision which bars all owners from charging market rents, is insufficient to meet the *Nollan* standard. That test, as we have noted, requires that the enactment "substantially advance" the legislative purpose (*Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987)), and directs an inquiry into the "nexus" between the means chosen and the end desired. *Id.* at 837. Here the ordinance prohibits predatory prices by an occasional park owner only by prohibiting market pricing by all. This is overbreadth carried to a ridiculous extreme, and makes it clear that preventing vindictive pricing is not the real purpose of the ordinance.

The one purpose the vacancy control law does substantially advance is to transfer the rent control premium – the power to collect the capitalized value of a portion of future rents – to the tenants in place when the ordinance is enacted. Since these tenants purchased their mobilehomes before vacancy control went into effect, they did not have to pay a rent control premium themselves. This increase in value of the tenants' mobilehomes when vacancy control is enacted is a pure windfall to the tenants. The prospect of gaining such a windfall, not the protection of future tenants, is the real motivating force behind vacancy control laws. Indeed the proponents of the Escondido initiative (Proposition K) circulated a handbill urging tenants to support the measure because,

among other things, it will "dramatically increase the value of your home." (Ex. A, attached to this brief.)

Is increasing the value of tenants' mobilehomes at the park owners's expense a "legitimate" state interest as that term is used in *Nollan*? Our research has disclosed no cases answering that question, but it seems to have been generally assumed that if the state wants to take a property interest from one person to give to another, it must pay for the property, even if the transfer serves some overriding goal of redistribution of income. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), for example, the Court held that Hawaii could condemn the property of the landlord, paying him fair market value, and give it to his tenants as part of a land reform program. But no one would maintain that Hawaii could have taken the property without paying for it.

The community of Escondido may legitimately seek to improve the lot of mobilehome tenants. But this public purpose cannot constitutionally be achieved by putting a disproportionate burden on the park owners.

B. Substantive Due Process

In *Lawton v. Steele*, 152 U.S. 133, 137 (1894), the Court declared that:

> To justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Fifty-eight years later in *Goldblatt v. Hempstead*, 396 U.S. 590, 594-595 (1962), the Court quoted this passage as "still valid today", and relied on that test in upholding a land use regulation.

If we follow this language closely, and do not reduce it to a one step inquiry into whether the State "could

rationally have decided" the measure adopted might achieve its objective (*Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)), it mandates an inquiry not only into the rationality of the measure, but also whether it serves the interests of the public generally, as distinguished from those of a particular class. Such an inquiry here would lead to the conclusion that the vacancy control provision does not; it served only the interests of present owners of mobilehomes in Escondido mobilehome parks. The *Lawton* test would also require inquiry into whether the vacancy control provisions were "unduly oppressive upon individuals." Here the ordinance requires park owners to lease their property perpetually for figures which will year by year fall further behind market rates, while permitting the tenants to collect and keep for themselves the capitalized value of the difference between regulated and market rents. Thus a court could well find mobilehome park vacancy control laws invalid without looking into the rationality of those measures.

But even if we focus solely on the question of rationality, the ordinance may fail the test. Upon remand following the Ninth Circuit decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270, *cert. denied*, 485 U.S. 940 (1988), the federal district court heard evidence and concluded that:

> the section of the Ordinance that forbids rent increases of more than 10 percent when a tenant sells his or her mobile home or moves from the park *is not rational*. First of all, it does nothing to protect "the continued ability of park residents to afford to maintain residency in such parks." [Quoting the purposes of the Santa Barbara ordinance] . . . As long as the tenant is protected for the duration of his or her tenancy, the threat of being uprooted due to protective rents is gone.

> Secondly, to the extent that the purpose of the Ordinance is to provide low and moderate income housing in general, the Ordinance wholly fails to achieve that purpose. It does nothing to keep low and moderate income housing available to subsequent tenants as those subsequent tenants are paying high premiums for the coaches they buy from the former tenants.

Hall v. City of Santa Barbara, No. 84-9506, slip op. at 10-11 (C.D. Cal. 1989) (Emphasis added). After noting that the ordinance placed no limits on the amount for which tenants could sell their mobilehome, the trial court concluded that "the vacancy provision of the Ordinance is irrational and unconstitutional." *Id.*

We have no comparable trial record here. Instead the question is whether plaintiffs can get to trial, whether they will ever have the opportunity to present evidence, like that presented in *Hall*, to show the irrationality of the ordinance. The finding of the district court in *Hall* suggests that if given that opportunity, plaintiffs may be able to show that the vacancy control provisions of the Escondido initiative ordinance fail even the rationality test of substantive due process.

CONCLUSION

For the reasons stated above, the United States Supreme Court should reverse the judgment of the California Court of Appeal, and permit plaintiffs to prove that the vacancy control provision of the Escondido ordinance takes their property without just compensation and denies them due process of law.

DATED: November 26, 1991

Respectively submitted,

MICHAEL A. WILLEMSEN
DAVID SPANGENBERG
By: MICHAEL A. WILLEMSEN
Counsel of Record

EXHIBIT A

DECLARATION OF
CHARLES E. du PONT, JR.

I, Charles E. du Pont, Jr., hereby declare and state:

1. I am over 18 years of age and am one of the general partners of Vista Verde, Ltd., a California Limited Partnership, which is the owner of Vista Verde Mobile Estates (the "Park"), a 100-space mobile home park in Escondido, California.

2. Vista Verde, Ltd. has owned the Park since September 1983.

3. The following facts are true of my own personal knowledge and if called as a witness, I could and would testify truthfully thereto:

> The attached Exhibit A, EMPAC Newsletter, Vol. II, No. 6, was distributed to the tenants in the Park in May 1988 just prior to the election in Escondido on June 7, 1988, at which time Proposition K, The Escondido Rent Stabilization Ordinance was on the ballot. Copies of said Newsletter were placed in the tenants' mailboxes throughout the Park.

4. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED THIS 16th day of November, 1991 at Solana Beach, California.

/s/ Charles E. du Pont, Jr.
CHARLES E. du PONT, JR.

App. 2

EMPAC NEWSLETTER Vol. II No. 6

- You Can Stabilize Your Rent
- You Can Dramatically Increase The Value Of Your Homes

Just Vote – June 7th

VOTE YES ON "K"

VOTE NO ON "N"

We Also Must Have Our Friends On The City Council, So,

RE-ELECT JERRY HARMON

ELECT KRIS MURPHY

ELECT CARLA DEDOMINICIS

Please call your friends outside your mobilehome park and ask them to vote also.

Attend the last general meeting before the June 7th elections:

May 24th 6:30 pm Turrentine Room at the library.

Send your contributions today

Name _____ Mail to:
EMPAC
Address _____ 2550-1 East Valley ~~Pk~~wy

Supreme Court, U.S.
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(7)

No. 90-1947

In The

Supreme Court of the United States

October Term, 1991

JOHN K. YEE and IRENE S. YEE, et al.,

Petitioners,

v.

CITY OF ESCONDIDO,

Respondent.

On Writ Of Certiorari To The Fourth Appellate District, Division One Court of Appeal For The State Of California

BRIEF AMICUS CURIAE OF MANUFACTURED HOUSING EDUCATIONAL TRUST OF SANTA CLARA COUNTY IN SUPPORT OF PETITIONERS

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No. 90-1947

In The

Supreme Court of the United States

October Term, 1991

JOHN K. YEE and IRENE S. YEE, et al.,

Petitioners,

v.

CITY OF ESCONDIDO,

Respondent.

On Writ Of Certiorari To The Fourth Appellate District, Division One Court of Appeal For The State Of California

BRIEF AMICUS CURIAE OF MANUFACTURED HOUSING EDUCATIONAL TRUST OF SANTA CLARA COUNTY IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Manufactured Housing Educational Trust of Santa Clara County is a nonprofit mutual benefit corporation organized under the laws of the State of California to improve and promote the general interest and welfare of the manufactured housing industry in Santa Clara County, California. Members of the trust have a direct interest in the mobilehome industry in Santa Clara

County and a particular interest in the resolution of the issue before the Court in this case.

San Jose is the largest city in Santa Clara County. In 1986 San Jose adopted a mobilehome rent ordinance which included a prohibition on rent increases upon the in-place transfer of mobilehomes like the provision before this Court in the Escondido ordinance. In 1989, in response to the decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), the ordinance was amended to repeal this vacancy control provision. On September 10, 1991, in specific recognition of the decisions of California Courts of Appeal refusing to follow *Hall* and of the pending petition for certiorari in this case, San Jose amended its ordinance to limit rent increases upon the in-place transfer of mobilehomes, but suspended the provision until the city attorney certifies that it is legally permissible to impose vacancy control on mobilehome space rents. The current ordinance provides for an adjustment of rents to provide at least a partial rebate of rents paid prior to the adoption by the city of a resolution terminating the suspension of the "vacancy decontrol" provision. Members of the trust are concerned with the effect on the vitality of the mobilehome industry of the type of rent control provision at issue in this case and possess a direct interest in the effect of the decision of this Court on the ordinance in San Jose. Written consent of the parties has been received to file this brief as amicus curiae in support of petitioners. The letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

The provision of the Escondido Mobilehome Rent Protection Ordinance that transfers a right to collect rent from the mobilehome park owner to the mobilehome owner deprives the park owner of a property interest protected by the Due Process Clause of the Fourteenth Amendment.

The circumstances of this case suggest that the ordinance should not be granted total deference by reviewing courts and should be reviewed to ensure that the transfer of a property interest challenged in this case substantially advances a legitimate government purpose. A strong potential for arbitrary action is indicated by the facts that the ordinance was adopted by initiative after being rejected by the city council, that the legislative body of the city may not amend the ordinance to correct unjust results, and that the ordinance contains no identification of legitimate purposes and states no rational basis for the policy choice establishing unequal treatment between two persons allowed to collect rent on the same property.

The ordinance violates the Due Process Clause because there is no real and substantial relation between the challenged provision and the purposes of the ordinance as argued to the Court by counsel or as reasonably hypothecated from the circumstances.

ARGUMENT

I

THE RIGHT TO COLLECT RENT IS A PROPERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Escondido's Mobilehome Rent Protection Ordinance has severed from the rights inhering in the ownership of a mobilehome park the right to collect that portion of the normal market rent that is above the controlled rent level set by the board. That right to collect rent is, in effect, granted to the mobilehome owner who is occupying the space in the park. It is this transfer of the right to collect rent from park owner to mobilehome owner that violates the park owner's due process rights.

"The Fourteenth Amendment's protection of 'property' . . . has been read broadly to extend . . . to 'any significant property interest' . . . . " *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972), quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The property interest in the right to collect rent exists both as an incident of ownership of the real property and as personal property in an obligation of contract created by the lease. For real property such as mobilehome parks the "property" for purposes of the Fourteenth Amendment is defined by the ownership interests that arise in relation to the physical property itself. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). "The constitutional provision is addressed to every sort of interest [in relation to real property] the citizen may possess." *Id.* Among the protected interests in property is the right to keep "the value of the use" of the

property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). This Court has recognized that "the right of property in land" is affected by government actions that regulate "the amount of rent that may be charged." *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922).

The right to collect rents under the lease is also a protected property interest. "Valid contracts are property. . . . " *Lynch v. United States*, 292 U.S. 571, 579 (1934). Under California law "[t]here may be ownership . . . of all obligations . . . " (Cal. Civ. Code § 655 (West's 1982)) and the right to collect rent under a valid lease is a "thing in action" which is recognized as personal property. Cal. Civ. Code § 953 (West's 1982).

II

PLAINTIFFS' PLEADINGS STATE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY DEMONSTRATING THAT THERE IS NO REASONABLE NEXUS BETWEEN THE RENT CONTROL PURPOSE OF ESCONDIDO'S ORDINANCE AND THE MEANS EMPLOYED THAT ALLOW THE OWNER OF THE MOBILEHOME TO COLLECT RENT IN THE FORM OF A PREMIUM PAYMENT AT THE TIME OF SALE OF THE MOBILEHOME

This Court has not established a set formula for determining when a municipal ordinance violates the requirement of the Due Process Clause of the Fourteenth Amendment " 'that the means selected shall have a real

and substantial relation to the objectives sought to be attained.' " *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980), quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934). While the question remains the same in different cases the level of deference accorded the municipality's judgments and the intensity of the Court's review vary according to the degree to which the circumstances suggest the possibility of arbitrary action. In this case the level of review applied by the California courts falls far short of the requirements of due process.

This case comes to this Court on the pleadings having been dismissed after the trial court sustained the city's demurrer without leave to amend and dismissed the case. The Court of Appeal affirmed without directly addressing the due process issue. The Court of Appeal only noted that "[n]o one can dispute that Escondido's rent control ordinance . . . effects a transfer of value from landlords to tenants. The critical question is whether such a transfer can be justified by a rational governmental purpose, i.e., are the controlled rents fair and reasonable." It decided that since "plaintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents" it would assume that the rents were fair and no constitutional violation could result. Petition for Certiorari at A-13-14. In concluding its opinion, the Court of Appeal explained its position that "the decision whether to use rent control as a took [*sic*] to correct imperfections in the market system is a political issue for legislative bodies and not a question of constitutional law for the courts." Petition for Certiorari at A-28.

Thus, the decision of the Court of Appeal is a broad, facial ruling that due process is satisfied by an ordinance that includes as one of its provisions control of rent levels as long as the rents are "fair and reasonable." That conclusion merely begs the question presented by the allegations in the complaint. "Though no issue is raised here that the rent paid by the tenant is insufficient, that fact does not end the inquiry." *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) (Rehnquist, J., dissenting). Petitioners should have been allowed to prove that the transfer of the property interest in collection of rent had no real and substantial relation to the objectives of the ordinance. As demonstrated by this case, an ordinance that otherwise serves legitimate state interests may contain specific provisions that have no rational relationship to those objectives.

A. The Total Deference Applied by the Court of Appeal Is Inappropriate on the Facts of This Case

While this Court has certainly counseled that the Due Process Clause allows great deference to the decisions of legislative bodies in economic matters in general and in rent control in particular, *see, e.g., Pennell v. City of San Jose*, 485 U.S. 1 (1988), it has never countenanced a total abrogation of judicial responsibilities. Moreover, a general ordinance that undoubtedly has a legitimate public purpose can nonetheless violate the Due Process Clause if individual provisions of the ordinance are not rationally related to that purpose. *See, e.g., Moore v. East Cleveland*, 431 U.S. 494 (1977).

In *Moore* this Court accepted that it had already held in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), that "limits on the types of groups that could occupy a single dwelling unit . . . bore a rational relationship to permissible state objectives." *Moore*, 431 U.S. at 498. Nonetheless, this Court examined the specific provisions of the East Cleveland ordinance and determined that the city's particular means of pursuing those objectives violated the Due Process Clause. *Id.* at 500-06.

In *Texaco v. Short*, 454 U.S. 516 (1982), this Court examined a state statute which, like the ordinance in this case, would cause the loss of a property interest by one group of persons that would then inure to another group of persons. Before upholding the statute against a due process challenge the Court was careful to examine "[e]ach of the actions required by the State" to determine if each "furthers a legitimate state goal." *Id.* at 529. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Court expressly noted that different aspects of the same legislation must be examined separately under a due process analysis and that the justifications for one may not suffice for another. *Id.* at 17.

A due process analysis must recognize "that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

Even the most deferential standard of review has not been treated as an abdication of the judicial role. Although the Court may cast a casual glance, it does not

turn a blind eye. Indeed, this Court has not hesitated to hold municipalities to account when the circumstances of the case suggest a possibility of arbitrary governmental conduct. *See, e.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Moore, supra.*

The constitutional challenge presented in this case is not a broad attack on the legitimacy of "price control" as a legislative purpose. It is narrowly focused on the provision of the Escondido ordinance that transfers the ability to collect a portion of the rent for the space in the mobilehome park from the owner of the park to the owner of the mobilehome who is in possession of the space and who is leaving the park and selling the mobilehome. This characteristic distinguishes this case from price control in general and from the other rent control statutes previously reviewed by this Court. *See Pennell v. City of San Jose, supra; Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Porter v. Lee*, 328 U.S. 246 (1946); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924); *Edgar A. Levy Leasing Co. v. Siegel, supra; Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

As a minimum the courts below were obligated to determine the specific permissible objectives for Escondido's rent protection ordinance and to identify that the specific provision of this ordinance which plaintiffs challenge has " 'a real and substantial relation to the objective sought to be attained.' " *Pruneyard*, 447 U.S. at 85, quoting *Nebbia v. New York*, 291 U.S. at 525. By casually dismissing both the claim and the complaint the courts below failed in their judicial responsibility to measure the challenged

provision of the ordinance against the appropriate constitutional standards.

The indicia of potential inappropriate governmental conduct are strong enough in this case to call upon this Court to take a clear look at the rationality of the means employed to achieve the asserted ends of the ordinance.

B. The Transfer by the Escondido Ordinance of a Significant Property Interest Implicates Fundamental Individual Rights and Suggests That Total Deference to the Municipal Decision Is Inappropriate

The test set forth in *Nebbia, supra*, requires not only that the challenged ordinance serve "a proper legislative purpose" (291 U.S. at 537) but also "that the means selected shall have a real and substantial relation to the object sought to be attained." *Id.* at 525. Although as a general proposition "[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular . . . " (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)), the Court has not hesitated in other contexts to question the relationship between means and ends when the means employed affect significant individual interests and where potentially inappropriate purposes were identified. Without resorting to "strict scrutiny" the Court has carefully reviewed the relationship between objectives chosen and the means employed in a wide variety of contexts. *See, e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (significant property interests);

Cleburne v. Cleburne Living Center, supra (mental retardation); *Williams v. Vermont*, 472 U.S. 14 (1985) (preferences for in state residents); *Moore v. East Cleveland, supra* (family relationships); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (distribution of contraceptives); and *Reed v. Reed*, 404 U.S. 71 (1971) (male preferences).

The teaching of these cases is that the substantial deference accorded the legislative selection of ends does not necessarily extend to the selection of means in circumstances that suggest that important interests of adversely affected individuals may be subjected to arbitrary or unreasonable treatment.

The more careful review demonstrated by these cases does not suggest a return to the judicial intervention in legislative prerogatives characterized by the *Lochner* era. These cases do not second-guess the legislative policy choices over what areas or subjects require regulation. They do not employ "strict scrutiny" nor do they demand "compelling governmental interests" to justify the decision to regulate. The review employed in these cases is of limited scope directed only to ensure that when important individual rights are affected the means employed bear a substantial relation to the legislative choice of purposes.

The nature of the review is set by the context of the case with attention focused on the nexus between the means employed and the ends sought to be achieved. "Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means

. . . must be reasonably related to the end. . . . " *Perez v. Brownell*, 356 U.S. 44, 58 (1958), overruled on other grounds, *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). Where important individual rights are involved this nexus must be substantial enough to ensure that under the circumstances a few persons are not being required to bear disproportionate burdens for minor improvements in the public condition. The due process requirement that the law not be arbitrary or irrational in its effect means that the burdens imposed must substantially advance a legitimate state purpose.

At its core, the evaluation of this nexus is a balancing test that recognizes that the Due Process Clause in its substantive context as well as in its procedural context is a mandate for fairness. Legislative bodies exercising their police power must be allowed clear fields and broad horizons to protect and promote the public welfare in our modern society. Yet it is fundamental that the very breadth and depth of the reach of the police power results in continuous collision with the expectations and rights of individuals. For the courts, the protection of individual rights is no less important than the protection of the legislative authority. As the arbiter of this conflict the courts must of necessity balance one against the other. When fundamental individual rights are at stake this review must not be based on unquestioning deference, but on reasoned judgments on whether the regulation of the individual rights in each case substantially advances a legitimate governmental purpose.

Given the significant individual property right at stake in the transfer by the Escondido ordinance of the right to collect rent from the owner of the mobilehome

park to the owner of the mobilehome, the courts below failed to exercise properly their responsibilities under the Due Process Clause to test the adequacy of the nexus between the transfer of the property interest and the rent control objectives of the ordinance.

C. Consideration of Other Factors Suggests That Total Deference Not Be Granted the City in This Case

In addition to the loss of important individual rights discussed above, other factors present in this case suggest the effects on the mobilehome park owners may be arbitrary and unreasonable. These factors militate against the granting of total deference to the city.

The Escondido Rent Protection Ordinance is not a product of the deliberation of a legislative body. It was adopted by a vote of the city's electors on an initiative measure. The legislative body of a local government can be presumed to act in a constitutional manner and to set as the legislative objective the protection of the public welfare. Voters on the other hand act in their individual self-interest. This Court has recognized that private citizens cannot be presumed to be acting in the public interest even when officially designated to make a policy choice. "They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily. . . . " *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928).

On the other hand "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954). In

this case the normal deference to the "legislature" would go to the city council and that deference works against any presumption in favor of the ordinance. The city council for Escondido was urged to adopt a mobilehome rent control ordinance and refused to do so just prior to this initiative going on the ballot.[1] To the extent that legislative judgment is properly recognized in this case, it suggests that the initiative ordinance was not necessary to advance a legitimate government purpose.

One of the primary rationales for the principle of deference to legislative enactments being reviewed under the Due Process Clause is the recognition by the courts that matters of a legislative nature should be resolved by legislative action not by judicial intervention. "[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . ." *Berman v. Parker*, 348 U.S. at 26. The courts hesitate to address actions that are unwise, inappropriate, or even wrong, recognizing that corrections and needed adjustments are appropriately attained through the legislative process. Corrections to the Escondido Rent Protection Ordinance, however, cannot be enacted in the normal legislative manner. Under California law, a city ordinance adopted by the initiative process may not be amended by the legislative body unless provision for such amendment is made in the original ordinance. Cal. Elections Code § 4013 (West's 1977). This ordinance does not provide for amendment by the city council. No matter how oppressive the effects of the ordinance may be on park owners

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[1] *See* Minutes of the Escondido City Council meeting for July 15, 1987, reproduced in the Appendix to this brief.

they may turn for relief from its terms only to a popular election where they will face an oppugnant response from the large body of renters who outnumber them approximately 235 to 1 at the polls.[2] The initiative process in this case presents great potential for the majority to take unfair advantage of a minority. Due process requires that the courts look closely enough at this ordinance to ensure that the lack of an effective legislative process to correct abuse has not resulted in the infringement of the rights of individuals.

The form of the Escondido Rent Protection Ordinance also makes it particularly inappropriate to receive substantial deference. It contains no findings or statements of purpose related to the public interest. Voters were not presented with problems affecting the public welfare and were not given an opportunity to evaluate the reasonableness of the measure proposed in light of the nature of the problem being addressed. The ballot measure on its face simply asked a largely disinterested electorate to grant a special economic benefit to a special group of people at no cost to the voters at large. Such a circumstance calls out for careful consideration of whether the means employed substantially advance a

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[2] There are 37 mobilehome parks in the City of Escondido and approximately 4,500 spaces in those parks. Eighteen of the park owners are not residents of the city. At the ballot box for city elections, those who rent spaces in parks outmatch those who own the parks by approximately 235 to 1. Letters to the editor during the campaign for the initiative referred to park owners as "millionaires," "liars," "robbers," and "gang of wealthy park owners" who brought in a "costly hired gun," a "big gun attorney," and a "hired political assassin."

legitimate public purpose as opposed to the private interests of the initiative's sponsors.

The lack of any legislative pronouncement on the purposes of the ordinance places an extra burden on the reviewing courts to ensure the protection of individual rights under the Due Process Clause. The Court faces two very unreliable alternatives as its only sources for determining the purposes of the enactment. It may accept the post hoc rationalizations of Escondido's counsel on the purposes for the ordinance, or the Court may hypothecate its own ideas on what objectives might have motivated the voters of Escondido. Either approach is less than satisfactory for the protection of the park owners' rights.

In other contexts this Court has frequently counseled against the uncritical use of post hoc rationalizations of counsel by a reviewing court. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Moreover, while a court may be competent to recognize legislative facts and to impute with some degree of accuracy the objectives of a legislative body, an attempt to define the motivations of voters in a public election is a chancy affair at best. The employment of either of these approaches should call for attention to the facts of the case beyond total deference. The Court must take special care to ensure that the objectives attributed to Escondido's initiative ordinance by either of these two methods are sufficiently clear and obvious from the circumstances that it is more probable than not that they were on the mind of the voters at the time of the election.

Yet another concern with the Escondido ordinance arises from the arbitrary distinction between the two parties who are allowed to collect rent for the space in the park. By transferring to the owner of the mobilehome a possessory interest in the space in the park, the city has created in effect a second owner who is in a position to collect rent.[3] The rent control provision, however, restricts only the rent collection by the park owner. Section 3. It does not restrict rent collected from a prospective purchaser by the seller of a mobilehome in the park. This disparate treatment of the two parties who are similarly situated with regard to the collection of rent suggests arbitrary action. While the choice among alternatives, all of which are rational and fair, is normally left to the legislative body, the chosen scheme must approach the problem rationally. *National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co.*, 470 U.S. 451, 477-78 (1985). Due process requires that the inconsistency in the application of the rent restriction to the two parties allowed to collect rents must be reviewed to determine whether on the facts of the case the apparently arbitrary choice substantially advances a legitimate purpose of the ordinance.

The substantial deference normally afforded enactments of a legislative body for review under the Due Process Clause is not appropriate in this case where the Escondido city council did not adopt the ordinance and

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[3] In *Hall v. City of Santa Barbara*, 833 F.2d 1270, the Circuit Court referred to this situation as creating "complementary estates in the same land." *Id.* at 1279.

cannot correct its shortcomings and where the rent protection ordinance on its face does not set forth a legitimate government purpose and displays an arbitrary choice to impose disparate treatment on similarly situated parties.

D. The Provision of the Escondido Mobilehome Rent Protection Ordinance That Transfers a Property Interest in the Ability To Collect Rent from the Park Owner to the Mobilehome Owner Does Not Advance Any Legitimate Purpose of the Ordinance

As discussed above, determining the purposes of Escondido's ordinance is an initial challenge requiring careful judicial deliberation. The ordinance itself is silent and, since no trial was allowed, there is no other factual documentation in the record to assist in this most important task. The lack of any reliable indication of the proper purposes for the ordinance suggests that it was error for the courts below to affirm summarily the constitutionality of the ordinance and dismiss the case.

Although this Court gives substantial deference to the selection of purposes by a legislative body, just any purpose is not enough. Without resorting to the "compelling governmental interest" analysis, this Court has been willing to invalidate statutes that pursue apparently inappropriate objectives. For example, a state may not "discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'" *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 878 (1985) (quoting *Allied Stores of Ohio, Inc.*

v. Bowers, 358 U.S. 522, 533 (1959)). In this case there is a substantial possibility of a similar unacceptable purpose in that the voters intended to favor the interests of mobilehome owners, all of whom are residents of the city, by burdening park owners, many of whom were known not to be residents.[4]

The purposes asserted by counsel for the city to defend the ordinance before this Court are limited:

> "The Escondido Ordinance seeks to remedy an inequitable market situation caused by the scarcity of mobilehome spaces by protecting mobilehome owners from unreasonable space rental increases therefore protecting the home owner's investments, while also providing park owners with a just and reasonable return on the park owner's investment." Respondent's brief in opposition at 27.

In this statement it is possible to discern two express objectives and one possibly implied objective.[5] The expressed objectives are "providing park owners with a just and reasonable return" and "protecting mobilehome owners from unreasonable space rental increases." It is possible that the language "protecting home owner's

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[4] "Wake Up, Escondido," letter to the Editor, *Escondido Times Advocate*, May 8, 1988, by Rudy Sweet, stated: "A high percentage of the park owners are from out of taown [*sic*] and guess what they do with their huge profits."

[5] As argued in II.C above, the Court should be reluctant to hypothecate possible purposes for an initiative ordinance such as this.

investments" is intended to imply an additional purpose to provide home owners assurance of an enhanced ability to sell their mobilehomes.

As discussed above this statement by counsel of the purposes served by the ordinance is a post hoc rationalization, an unreliable source for the true purposes of the initiative ordinance. With all due respect for counsel's attempt to dress up the ordinance with a finery that gives it an even-handed appearance, it is hardly conceivable that the advocates of the ordinance had any intention of assuring park owners of a just and reasonable return on their investment. The ordinance itself indicates the contrary. The ordinance commands the board to "approve such rent increase as it determines to be just, fair and reasonable." Section 4(g). It says the *increase* shall be just, fair, and reasonable, presumably to tenants as well as to park owners. It does not say that the owners' *return* shall be just and reasonable. The factors the board is to consider in setting rents do not refer to a just and reasonable return on investment. *See* Section 4(g). In fact the exact opposite is true. The board is prohibited from allowing *any* return on investment for capital improvements. The park owner is limited to recovering "the cost of the capital improvement, including interest." Section 4(h). Moreover, this asserted purpose cannot justify the provision of the ordinance that is challenged in this case. The transfer of the right to collect a portion of the rent from the park owner to the mobilehome owner has no rational relation to, and in fact works against, an objective to assure the park owner a fair and reasonable return.

The collection by the mobilehome owner of a portion of the rent above the controlled level also works against

the express purpose of limiting space rental increases. It serves no legitimate purpose as to existing home owners whose rent levels were controlled during their occupancy by other provisions of the ordinance. The ordinance grants selling mobilehome owners a windfall extracted from future mobilehome owners. For future homeowners the payment of advance rent in the form of a premium included in the purchase price works directly contrary to any purpose to limit space rental increases. For them it is, in effect, a charge of an uncontrolled increment of rent above the controlled rent levels.

Since the transfer of the property interest has no rational relationship to the purposes expressed by counsel, the Court is left to imply from the assertions of counsel or to hypothecate on its own that the windfall to the mobilehome owner is justified by the intent to protect the home owner's ability to sell the mobilehome. The argument appears to be that if park owners are allowed to raise rents when the home is sold they will raise rents far higher than would the owner of the mobilehome (through the premium payment) because the park owner would want to stop the transfer of ownership. This is the type of consideration that led the Ninth Circuit to find that a similar provision in the City of Los Angeles' mobilehome rent stabilization ordinance did further a legitimate government interest. *Azul Pacifico, Inc. v. City of Los Angeles*, ___ F.2d ___ (9th Cir. 1991), 91 Daily Journal D.A.R. 13599-602 (Nov. 5, 1991).

Despite the unexplained conclusion by the Ninth Circuit, the relationship between the windfall granted the mobilehome owner and the need to protect the investment in the mobilehome is hard to isolate and difficult to

define. It is counterintuitive to suggest that allowing the park owner to raise rents will result in attempts to interfere with the transfer of ownership of mobilehomes. The ability to increase rents at the time of sale would be a strong economic incentive for the park owner to *assist* in the transfer. On the other hand, without the economic incentive of a rent increase, the uncertainties and burdens of adapting to a new tenant (whom the park owner cannot select) provide incentives for the park owner to resist such transfers. Common sense dictates that the provision being challenged does nothing to encourage park owners to assist the transfers and could work to promote resistance by park owners to mobilehome sales.

At the very least the improbability of such conduct requires that the petitioners be allowed to make their case in court that no facts exist to support this asserted objective.

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) (citation omitted).

It is important to recognize that the asserted problem, if it exists at all, has a very limited possible scope. The problem that is supposedly being addressed is the raising of the space rental at the time the mobilehome is for sale. However, the increase of the mobilehome price

by the home owner in order to capture the rental value will have exactly the same effect as an increase by the park owner. It must be accepted as true from the pleadings that the mobilehome owners themselves will exercise their new property interest and raise the effective rents at the time of transfer. As noted by the Ninth Circuit in *Azul, supra*, these advanced rental payment charges by mobilehome owners are very substantial, ranging as high as $72,000 with an average figure for the Los Angeles area of $20,880. 91 Daily Journal D.A.R. at 13599, 13601. These figures represent the present value of *very significant rent increases*. $72,000 represents a $600 per month rent increase over 10 years without discounting for present value (or put another way, without escalation for future inflation).

The only rational presumption is that both parties will be inclined to collect as much rent as the market will allow and that the limits imposed by the rental market will stop either one from collecting a much higher rent than the other. There is no economic basis for an assumption that the increase by the park owner would have a different effect on the willingness to buy than would the increase by the mobilehome owner. The market effect on the knowledgeable buyer should be the same.

A problem can only be created out of this apparently neutral situation by presuming that park owners will act contrary to their own economic interests and that they are, as a class, so vindictive, vicious, or pernicious that they will turn down a clear economic advantage to them if the mobilehome sells in order to inflict harm on the mobilehome owner by demanding rent so far above market levels as to block a sale. This is too much to presume

to be the ordinary state of affairs. Without legislative findings or a record demonstrating that such improbable conduct is likely, the probability that this problem exists is remote and highly speculative.

To solve a hypothetical and improbable concern, the city has adopted an ordinance that causes a major intrusion on the protected property rights of the park owners and creates a major, unjustified economic windfall for the mobilehome owners. The provision challenged in this case works against the two governmental purposes expressly advocated by the city to justify the ordinance. Without hypothecating the existence of a problem that is contrary to normal human behavior, the provision of Escondido's ordinance that bestows a windfall on mobilehome owners at the expense of park owners has no rational relationship to any legitimate governmental purpose.

CONCLUSION

It was clear error for the California courts to dismiss plaintiffs' complaints. On the facts alleged the provision of the Escondido Mobilehome Rent Protection Ordinance that transfers the right to collect rent from the park owner to the mobilehome owner does not "have a real and substantial relation to the objectives" of the ordinance. This Court should reverse the decision of the California Court of Appeal and allow plaintiffs to prove their claim

that the ordinance as applied to them violates the Due Process Clause of the Fourteenth Amendment.

DATED: November, 1991.

Respectfully submitted,

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APPENDIX

EXCERPTS OF THE
MINUTES OF THE REGULAR MEETING
OF THE CITY COUNCIL, WEDNESDAY
JULY 15, 1987

CONSIDERATION OF MOBILE HOME RENT CONTROL

Mayor Rady opened the public hearing and asked if anyone would like to speak regarding this matter.

Phyllis Winters, Casa de Amigos Mobilehome Park, member of EMPAC, suggested the City Council follow the direction of Oceanside and San Marcos which have adopted rent control ordinances that are legal with the State of California.

Mark O'Brian, speaking for his grandmother who lives in the Valley Parkway Mobilehome Park, urged the Council to implement some type of rent control for mobilehome residents.

C. D. Douglass, 2300 E. Valley Parkway, thanked everyone who has been involved in this issue since the beginning in 1983. He said they still feel that a housing authority would be appropriate with explicit rules and penalties for violations.

Don Olmstead, 809 Olive, Vista, spokesman for EMPAC (Escondido Mobilehome Action Committee) reviewed the letter from EMPAC and spoke in support of the proposed ordinance with the changes as recommended in their letter.

Robert Caldren, attorney with Hard, King & Caldren, Santa Ana, representing the Escondido Mobilehome Park Owners' Association, spoke against rent control. He said

the park owners do not like the proposed ordinance and the mobilehome residents are not entirely satisfied with the proposal before the City Council. He referred to several court opinions involving rent control (i.e. Sonoma Country [*sic*] Board of Supervisors, City of Fresno and Palm Desert.) He felt that proposed ordinance contained problems and potential liability.

Councilmember Thurston read a letter from Dan Johnston, owner of Mountain Shadows Mobilehome Park, in support of the proposed ordinance.

Harold Greenbalm, chairman of the North County Slow Growth Alliance, Leucadia, spoke regarding the high cost of housing in North County. He said he was extremely concerned about the senior citizens and urged the Council to show compassion towards the senior citizens.

Councilmember Cowan indicated the City Council has been told there are "horror" stories concerning rent increases in mobilehome parks; however, no one has come forward to speak of any specific incidents.

Nat Savit, 1301 S. Hale Avenue, complained about the stench from the Hale Avenue Sewer Treatment Plant.

Mary Huff, Mountain Shadows Mobilehome Park, referred to Mr. Johnston's letter read by Councilmember Thurston and said that Mr. Johnston has his park up for sale.

Bertha Hickman, Escondido Terrace Mobilehome Park, said she signed a 10 year lease to avoid monthly rent increases.

Frank Rhinehart, Space 86, Escondido Terrace Mobilehome Park, spoke regarding the lease at his

mobilehome park indicating there is a minimum increase of 5% regardless of the CPI, plus utilities.

Councilmember Harmon indicated one of the things EMPAC has been working on doing is to try and establish an organized clearing house in the City so concerns and problems can be identified and documented before they are brought to the City Council.

Don Olmstead referred to a letter from Swanson & Dowgall, attorneys at law, dated January, 1987, (copy on file in the City Clerk's office) referring to changes in the Mobilehome Residency Law and Other New Laws. He said this letter was given to all mobilehome park owners.

Buz Dupont, 312 N. Sierra Avenue, Solana Beach, part owner of Vista Verde Mobilehome Park, said he has never seen the letter referred to by Mr. Olmstead. He referred to Doris Thurston's "white paper" from last December that specifically addressed the problems faced by the "needy" elderly. A plan has been developed by park owners to assist "needy" elderly. He did not feel that rent control was the answer to helping the "needy" elderly.

Rudell Sweet, 1380 Oak Hill Drive, spoke regarding the signing of a lease with her mobilehome park.

Mark O'Brien spoke further regarding rent increases from 1970 to the present as they relate to his grandmother. He said originally the utilities were included in her rent, but now they are paid separately. He felt rent control in mobilehome parks should have been implemented years ago.

A resident of Escondido Terrace reminded Council that mobilehome park residents are only renting a space to

park their mobilehomes on. They are not renting the dwelling as they would be with an apartment.

Iris McClure said she has lived at Carefree Mobilehome Park, 212 N. Citrus Avenue from 1962 to the present. She spoke regarding rents during this time.

Ann Anderson, Carefree Mobilehome Park, said she lives on Social Security and pays $287 a month plus utilities for a total of $304 each month.

Chuck Hughes, Western Mobilehome Association, 2605 Camino del Rio, San Diego, felt the park owners and residents were talking at each other and not to each other. He distributed an outline entitled "Organizational Structure of a Non-Profit Organization to Implement the Cooperative Solutions for the Yucaipa Mobilehome Park Residents" and encouraged Council to look into this type of approach. (Copy on file in the City Clerk's office.)

All persons having been heard who wished to be heard, the Mayor closed the public portion of the hearing at this time.

Councilmember Harmon encouraged the Council to adopt the proposed ordinance with the changes recommended by EMPAC. Council discussed the issue of rent control verses rent stabilization and the fact the proposed ordinance is not favored by either the homeowners or the park owners.

Moved by Councilmember Harmon the City Council adopt the proposed ordinance drafted by the five member businessmen's committee with the additions and modifications provided by the EMPAC committee contained in the "blue" binder. Ayes: Harmon and Thurston.

Notes: Best, Cowan and Rady. Absent: None. Motion failed.

Moved by Councilmember Cowan the City Council direct staff to coordinate the examination of the proposal submitted by Chuck Hughes and return to Council with a report in 30 days. Motion carried unanimously.

NOV 27 1991

No. 90-1947

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN K. YEE, *et al.*,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

ON WRIT OF CERTIORARI TO
THE FOURTH APPELLATE DISTRICT, DIVISION ONE,
COURT OF APPEAL FOR THE STATE OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF ARIZONA MOBILE HOUSING ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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November 27, 1991

QUESTION PRESENTED

DOES A PHYSICAL TAKING RESULT FROM A STATUTORY SCHEME IN WHICH A LANDLORD CANNOT TERMINATE A TENANCY EXCEPT IN NARROWLY DEFINED INSTANCES OF "GOOD CAUSE"; IN WHICH THE LANDLORD, ABSENT "GOOD CAUSE" MUST RENEW RENTAL AGREEMENTS WITH TENANTS IN PERPETUITY; IN WHICH THE LANDLORD MUST PERMIT THE PURCHASER OF A MOBILE HOME ON HIS PROPERTY TO BECOME A TENANT WITH THESE SAME PRIVILEGES; IN WHICH A LANDLORD IS NOT FREE TO CHOOSE WHO WILL OCCUPY HIS PROPERTY WHEN A TENANCY ENDS DUE TO SALE BY A TENANT OF HIS MOBILE HOME; AND WHERE ULTIMATELY THE CHOICE OF WHO HIS FUTURE TENANTS WILL BE IS THAT OF HIS PRESENT TENANTS, NOT HIMSELF, REGARDLESS OF WHETHER OR NOT A RENT CONTROL SCHEME IS ALSO IN PLACE?

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BRIEF *AMICUS CURIAE* OF ARIZONA MOBILE HOUSING ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

This brief is submitted in support of the Petitioners herein.

The Arizona Mobile Housing Association, Inc. (AMHA) is a statewide organization of owners and managers of mobile home parks throughout Arizona. Arizona is in the same Federal Judicial Circuit as California.

The Arizona Mobile Home Parks Residential Landlord and Tenant Act was amended in 1987 to create a "perpetual lease" similar to the California Mobilehome Residency Law. The Arizona Act (Arizona Revised Statutes §33-1401, et seq.) since 1987, prevents a landlord from terminating or refusing to renew an existing tenant's rental agreement without "good cause," which is defined as violation of the rental agreement, nonpayment of rent, change in use of land, and repeated violations of landlord tenant laws. A.R.S. §33-1476(B). With respect to change in use of the land, the landlord must give affected tenants 180 days notice and must contribute the tenant's costs of relocating their mobile homes. A.R.S. §33-1476.01. If a tenant wishes to sell his mobile home on-site, the landlord must permit the purchaser to move in and become a tenant unless he has reasonable cause to disapprove the purchaser's tenancy. A.R.S. §33-1452(D)(3).

Contrary to California, the Arizona Act specifically prohibits local rent control, pre-empting that subject to the State. A.R.S. §33-1416(A). Arizona has not, to date, imposed any controls over the amounts which landlords may generally charge tenants as rent.

Thus, with respect to the instant case, Arizona law creates the "perpetual lease" much as California does, but does not yet have a system of mobile home space rent control in place.

The AMHA wishes to bring into focus the issue of whether State action creating a "perpetual lease" alone, without the existence of rent control, constitutes an unconstitutional taking of property without compensation.

SUMMARY OF ARGUMENT

A. The California Mobilehome Residency Law (Cal. Civ. Code 798 et seq.) limits a landlord's ability to terminate tenancies to narrowly defined instances of good cause, and obligates landlords to consent to assumptions of tenancies by purchasers of mobile homes on his property except in cases where he has narrowly defined reasonable grounds to withhold consent. The effect of these laws is that so long as the tenant does not give the landlord "good cause" to terminate the tenancy, he enjoys a "perpetual lease," giving him the right to permanently occupy the landlord's property, and giving him (not the landlord) to right to choose who will replace him once he decides to seil his mobile home and move.

B. The Escondido rent control ordinance creates similar restrictions for tenancies not covered by California statutes, and then imposes a system of rent control on all mobile home space tenancies.

C. The majority opinion of the Court below in *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 274 Cal.Rptr. 551 (1990) assumed that the California statutes constituted a reasonable "regulation" of the landlord-tenant relationship and then upheld the validity of the Escondido ordinance on the ground that it constitutes legitimate rent control.

D. Two U.S. Courts of Appeal have reached contrary results faced with similar statutes and ordinances. They have held that by imposing restrictions similar to those created by California in effect creating a "perpetual lease," the government has gone beyond reasonable "regulation" and has accomplished a physical taking of the landlord's property. In both of those cases, as here, the situations involved laws both creating a "perpetual lease"

and imposing rent control. In both of them, as with the Courts below in this case, the rent control effects of the statutory scheme were relied on in part as supporting the decisions. *See, Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir., 1986); *Pinewood Estates of Michigan v. Barnegat Township Leveling Board,* 898 F.2d 347 (3rd Cir. 1990).

E. All of these cases in turn, attempted to follow *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) and *F.C.C. v. Florida Power Corp.,* 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). *Loretto* held that the occupation of a landlord's property by a third party as a result of government action constitutes a physical taking. The Court stated that it did not intend to affect the State's powers to regulate landlord-tenant relationships, provided that those regulations do not subject the landlord to physical occupation of his property by a third party. *F.C.C.* held that *Loretto* does not apply when the landlord is not obligated to allow the third party to physically use his property. So long as the landlord has a legitimate choice whether or not to allow a tenant to use his property, government action regulating the rents he can charge that tenant do not constitute a physical taking.

F. The majority opinion below in *Yee* treated this as a rent control case, concluding that the rent control aspects of the Escondido ordinance were constitutional, and from that upheld the entire ordinance. Rent control, however, is not the issue in this case. The issue is whether or not the involuntary conversion of mobile home space rental agreements into "perpetual leases" constitutes a physical taking. The principles of *Loretto* and *F.C.C.* lead to a conclusion that regardless of whether

there is any rent control in the community or not, the provisions of the ordinance and of State law creating the perpetual lease constitute a physical taking. In determining that the physical taking has occurred, this Court does not even need to reach the rent control or economic issues.

G. A statutory scheme in which a landlord cannot terminate a tenancy except in narrowly defined instances of "good cause"; where the landlord, absent "good cause" must renew rental agreements with tenants in perpetuity; where the landlord must permit the purchaser of a mobile home on his property to become a tenant with these same privileges; where a landlord is not free to choose who will occupy his property when a tenancy ends due to sale by a tenant of his mobile home; and where ultimately, the choice of who his future tenants will be is that of his present tenants, not himself, is a physical taking regardless of whether or not there is a rent control scheme in place.

ARGUMENT

STATE ACTION IN CONVERTING MOBILE HOME TENANCIES INTO "PERPETUAL LEASES" CONSTITUTES A PHYSICAL TAKING OF THE LANDLORD'S PROPERTY EVEN IN THE ABSENCE OF RENT CONTROL.

The California Mobilehome Residency Law (Cal. Civ. Code 798 et seq.) prohibits the termination of tenancies of mobile home spaces except for certain narrowly defined good cause. Cal. Civ. Code §798.56. It also obligates the landlord to allow a purchaser of a mobile home to become a tenant unless the landlord has an objective and narrowly defined reasonable basis to disapprove. Cal. Civ. Code §§798.56(a) and 798.74. In effect, the

California statutes convert mobile home space rental agreements into "perpetual leases."

The California Court of Appeal, in sustaining the Escondido ordinance under review in the instant case, held in part that this sort of "regulation" of the landlord-tenant relationship did not constitute a taking. *Yee v. City of Escondido,* 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990).

It is the position of this brief that the California statutes go beyond "regulating" the landlord-tenant relationship. By converting space rental agreements into "perpetual leases," those statutes vest in tenants the right to permanently occupy the landlord's property and thus constitute a physical taking of his property by the State.

Although mentioning the restrictions in California law which result in the "perpetual lease," the essence of the decision in *Yee* upholding the Escondido ordinance was that the rent control aspects of the ordinance do not constitute a taking.

In *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir., 1986), the Court was faced with a Santa Barbara ordinance which accomplished two things:

1. It effectively duplicated State law insofar as termination of tenancies and transfer of tenancies was concerned; and

2. It imposed a scheme of rent control

Hall held that the Santa Barbara ordinance may constitute an unconstitutional taking.

The Escondido ordinance in the instant case does not explicitly duplicate State law as to termination and transfer of tenancies. It does, however, impose identical restrictions as to tenancies not covered by State law.

Both *Hall* and the Courts below in the instant case have failed to distinguish the "perpetual lease" from the rent control aspects of the local rent control ordinances. A careful analysis, however, discloses that the unconstitutional taking results from the conversion of these tenancies into "perpetual leases," not from the rent control provisions of the ordinances.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), found a physical taking where occupation is authorized by government without regard to the public interests that it may serve. The Court clarified, at footnote 9, that an invasion by a private party is treated no differently so long as that occupation is authorized by the State. It noted, however, that the holding was not intended to affect the State's powers to regulate landlord and tenant relationships, but went on to state:

> So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to non-possessory governmental activity.

Loretto, 458 U.S. at 441, 102 S.Ct. at 3179.

In *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), the Court found the *Loretto* rationale inapplicable to F.C.C. control over rates chargeable by pole owners to cable television services. The distinction was that in *F.C.C.*, nothing gave cable companies the right to use the poles, while in *Loretto,* the landlord was obligated to allow the private third party to physically use his property. This distinction was made clear in footnote 6, of the *F.C.C.* opinion where the Court stated:

> We do not decide today what the application of (*Loretto*) would be if the F.C.C. in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements.

Both *Loretto* and *F.C.C.* involved elements of rent control. In *Loretto*, the government set the maximum rates which the landlord could charge the user of his property. In *F.C.C.*, the government set the rents which the pole owner could charge the cable company. Yet, the focus of both decisions was not on the charges permitted the landlord. The decisive factor in both was whether the landlord had the choice of whether to allow the third party occupation. In *Loretto*, the occupation was mandated by government action, and it was that which resulted in the physical taking. In *F.C.C.*, the landlord had the choice of whether to permit the occupation. Since the landlord could simply say "no" to the proposed tenant, no taking occurred. This consideration is entirely separate from what the landlord can charge the tenant; whether the taking occurs is a different issue from what the landlord can charge.

In *Hall*, the 9th Circuit applied these principles to the Santa Barbara ordinance. It found that a physical taking had occurred since the ordinance transferred a possessory interest in the landlord's land; that the interest constitutes a right to occupy the property in perpetuity; and that the interest was transferable by the tenant. *Hall*, 833 F.2d at 1276.

The *Hall* Court also based its determination on the fact that the ordinance allowed the tenant to pay only a fraction of what the right was worth, and found that the right acquired a significant market value resulting from rent control. It need not have reached these two economic considerations in finding a physical taking. *Loretto*

declares that once a physical occupation results from government action, a taking results without regard to whether the action "has only a minimal economic impact on the owner." *Loretto*, 458 U.S. at 436, 162 S.Ct. at 3175.

Under *Loretto*, the fact that the Santa Barbara ordinance conferred on the tenant a permanent, transferrable possessory interest in the landlord's land alone supported the *Hall* court's determination that a taking resulted. It was unnecessary to even consider the financial impact on both landlord and tenant of the rent control aspects of the ordinance.

A landlord suffers many forms of damage resulting from this sort of taking, quite apart from the economic harm resulting from rent control. He loses the right to exclude persons from occupying the land; he loses the right to occupy the land himself; he loses the power to control the use of the property; and he suffers a loss in the value of the land resulting from this. *Loretto*, 458 U.S. at 435-36; 102 S.Ct. at 3176.

The *Hall* court applied this analysis, and came close to concluding that the rent control features of the Santa Barbara ordinance did not result in the taking; that it was the creating of the "perpetual lease" which did:

> . . . the Santa Barbara Ordinance, as it is alleged to operate, changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara.

Hall, 833 F.2d at 1279.

There are many other aspects of the fee ownership which a landlord loses by reason of the "perpetual lease" laws completely independent of rent control. Some of these are identified in *Hall*, footnote 23.

Since 1987, Arizona mobile home park landlords have been operating under laws similar to the "perpetual lease" provisions of the Santa Barbara ordinance, with no rent control, and suffering these sorts of damages. It is as a result of their experiences that this brief has been filed.

Even in the absence of the rent control aspect of the Santa Barbara ordinance, *Hall*, applying the principles of *Loretto* and *F.C.C.* was correctly decided.

Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F.2d 347 (3rd Cir. 1990) independently reached a similar result to *Hall* applying these principles. There, a State statute created the "perpetual lease" (similar to California), and a local ordinance imposed rent control. The 3rd Circuit found a physical taking since "(t)he combined impact of the statute and the ordinance operates to deprive the appellants of their possessory interest in the pad permanently." *Pinewood*, 898 F.2d at 353.

An analysis of *Pinewood* shows that the Court focused on the "perpetual lease" statute, not the rent control ordinance, in finding the physical taking. Although the Court dwelled at length on the inequities of the rent control ordinance resulting in windfalls to tenants reselling their mobile homes, the decision turned on the "perpetual lease" statute:

> We acknowledge, of course, that appellants may receive a constitutionally adequate rent for the occupancy of the tenants as such, but that fact is not material to our analysis for, according to the complaint, they receive nothing at all for the taking of the alienable physical property interest vested in their tenants.

Pinewood, 898 F.2d at 353; c.f., footnotes 10 and 11.

The *Pinewood* court itself distinguished this situation from a normal rent control case:

> First, in urban apartment rent control it is the landlord who chooses, selects and rents to the new tenants. No other party can sell the right to occupy the landlord's premises. Second, the tenant cannot occupy in perpetuity.

Pinewood, 898 F.2d at 356.

In the instant case, the Escondido ordinance does not reproduce the State "perpetual lease" statutes as the Santa Barbara ordinance did in *Hall*. It clearly incorporates them, however, and separately creates a "perpetual lease" for tenancies not covered by the State statutes (*see* section 6 of the Escondido ordinance). The reasoning of *Hall* and *Pinewood* applies to the Escondido ordinance no differently than it did to the laws at issue in those cases.

The right to occupy property in perpetuity is protected by the taking clause. *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); *Loretto, supra.* Even when the result of governmental expropriation is the transfer of private property to private parties, a taking has occurred. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); *Loretto, supra.*

In the instant case, it is not the rent control provisions of the ordinance by themselves which result in the taking. It is the "perpetual lease" statutes. The grossly inequitable results of the rent control provisions which flow

from their application to the tenants' "perpetual lease" merely illustrate in graphic terms the severe injustice to which a landlord may be subjected by the State's transfer of those rights to the tenants.

The California Mobilehome Residency Law transforms mobile home space rental agreements into "perpetual leases." It eliminates the right of a landlord to refuse to renewal rental agreements absent statutorily defined good cause; it gives the tenant (and his successors in interest) the right to choose who will replace him as an occupier of the property; and it deprives the landlord of the right to simply cause the space to become vacant upon expiration of a rental agreement or when the tenant moves out. This was duplicated by the rent control ordinance in *Hall,* and is partially duplicated in the Escondido rent control ordinance in the instant case.

This State action deprives the landlord of his right to exclude others not of his choosing from his land; it deprives him of the right to make non-possessory use of his property; it deprives him of the right to simply let his property sit vacant; and it seriously erodes the value of his property since any purchaser will take it subject to these same disabilities. In the words of the *Hall* court at footnote 23:

> To the extent these choices are narrowed or eliminated altogether, the burden on the landlord is increased and his essential attributes of ownership are eroded until they become illusory.

This State action constitutes a taking under the principles of *Loretto* and *F.C.C.* even without taking into account the severe impact of the rent control features of these ordinances. In fact, absent the State statutes and their counterparts in the local ordinances, it is unlikely

that any attack on the validity of the Escondido or Santa Barbara rent control programs would have been mounted in the first place.

CONCLUSION

This is not a rent control case. It can and should be decided without regard to the rent control features of the Escondido ordinance.

The effect of the California statutes and their counterparts in the Escondido ordinance creating the "perpetual lease" constitutes a taking under the principles of *Loretto* and *F.C.C.*

Respectfully submitted,

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(9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN K. YEE, *et al.*,
Petitioners,

v.

THE CITY OF ESCONDIDO,
Respondent.

On a Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

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BRIEF AMICI CURIAE FOR RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL MULTI HOUSING COUNCIL, AND CALIFORNIA HOUSING COUNCIL IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does a municipal rent control ordinance that prevents mobile home park owners from raising rents without governmental approval, in conjunction with state statutes that severely restrict the rights of such owners to evict current tenants or refuse to accept new ones, effect a "permanent physical occupation" of those owners' property within the meaning of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)?

2. If such an ordinance, in conjunction with the applicable state statutes, takes property from the landlord, and, at the same time, fails to protect the interests of the tenants that it was designed to serve, does the ordinance violate the Due Process Clause?

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This brief is filed on behalf of the Rent Stabilization Association of New York City, Inc., the National Association of Home Builders, the National Multi Housing Council, and the California Housing Council.*

INTERESTS OF THE AMICI

The Rent Stabilization Association of New York City, Inc. is an association of landlords and real estate operators in the Greater New York area, with 20,000 members who own approximately 650,000 units of housing.

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* Consent from counsel for all parties has been filed with the Clerk of this Court.

The National Association of Home Builders represents 153,000 builder and associate members organized into approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers.

The National Multi Housing Council, based in Washington, D.C., represents the interests of the larger and most respected firms in the country participating in the multifamily rental housing industry. Its members are engaged in all aspects of the development and operation of rental housing, including the ownership, building, financing, management and conversion to condominium of such properties.

The California Housing Council ("CHC") is a nonprofit association whose members are the larger owners, managers and developers of residential rental property in California. Since its formation in 1975, CHC has been actively involved in rent control issues at the local, state, and federal levels.

These organizations, and their members, have a clear and definite interest in the questions raised in this case, namely (1) whether rent control ordinances such as those involved in this case authorize "permanent physical occupation" of a landlord's property and (2) whether such ordinances violate the Due Process Clause.

STATEMENT

California's Mobilehome Residency Law, Cal.Civ.Code §§ 798-798.87 (West Supp. 1991) ("the Mobilehome Residency Law"), which was enacted in 1978, regulates many aspects of the relationship between the owners of mobile home parks and the owners of mobile homes (tenants) who rent spaces in the parks upon which to place their

mobile homes.[1] Among other things, the Mobilehome Residency Law provides tenants (in the language used by the legislature) with unique "protection from actual or constructive eviction. . . ." § 798.55. Park owners may terminate a tenancy only for certain reasons specified in the Mobilehome Residency Law. These include, among others, failure to pay the rent. § 798.56(e)(1).[2] It is further provided that if a tenant sells his mobile home to a third party, the park owner must accept the purchaser as a tenant "if the purchaser has the financial ability to pay the rent and charges of the park," unless the park owner "reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park." § 798.74(a).

In 1988, voters in the City of Escondido ("the City") passed an initiative measure which enacted a mobile home rent control ordinance ("the Ordinance"). Escondido, Cal., Municipal Code art. V, §§ 29-101 to 29-108 (1988).[3] The Ordinance provides, in pertinent part, that mobile home park owners shall not charge "rent for a mobile home space exceeding the rent for said space on January 1, 1986." § 29-103.[4] If the park owner wishes

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[1] The pertinent sections of the Mobilehome Residency Law have been reproduced in Appendix D to the Petition for Certiorari.

[2] Other reasons for termination include failure to comply with state and local laws relating to mobile homes, conduct by the tenant which constitutes a "substantial annoyance" to others, conviction for certain crimes committed within the mobile home park, failure to comply with "reasonable" rules of the park that are contained in the rental agreement, condemnation of the park, and a change in the use of the park, § 798.56(a)-(d), (f)-(g).

[3] *See* opinion of the court below, attached as Appendix A to the Petition for Certiorari, at 4.

[4] The Ordinance further provides that "[i]f a mobile home space is rented for the first time after January 1, 1986, the [park] owner shall not . . . [charge] rent for said space exceeding the rent first charged for the space." Section 3 of the uncodified ordinance, as reproduced in an attachment to Defendant City of Escondido's

to increase the rent, he must obtain approval from the City's Mobilehome Park Rental Review Board ("the Board"), which will hear evidence from both the park owner and the affected tenants and then "approve such rent increases as it determines to be just, fair, and reasonable." § 29-104. The Ordinance lists a number of factors which the Board shall consider in making its determination. *Id.*

Following passage of the Ordinance, petitioners John and Irene Yee ("petitioners"), the owners of a mobile home park in Escondido, filed a Complaint in the Superior Court of the State of California for the County of San Diego ("the trial court"). Petition for Certiorari 10-11. In the Complaint, they challenged the constitutionality of the Ordinance under the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, § 19 of the California Constitution, alleging, among other things, "a taking of plaintiff's property for public use and benefit without payment of just compensation. . . ." Complaint, para. 10.

The City filed a Demurrer (motion to dismiss) and Motion to Strike. Petition for Certiorari 12. After a hearing, the trial court granted both motions, while denying leave to the petitioners to amend the Complaint. Order of Dismissal, attached as Appendix C to the Petition for Certiorari.

Petitioners then appealed to the Court of Appeal for the Fourth District, Division One ("the Court of Appeal"), which affirmed the order of the trial court. Petition for Certiorari 16; Appendix A to the Petition for Certiorari ("App. A"). In its opinion, the Court of Appeal acknowledged that "Escondido's rent control ordinance does not exist in a vacuum," but rejected petitioners' argument that the combined effect of the Ordinance and the Mobilehome Residency Law effected a "tak-

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Memorandum of Points and Authorities in Support of Demurrer to Plaintiffs' Complaint.

ing" of petitioners' property within the meaning of the Fifth Amendment. App. A, at 5, 6. While conceding that the Ordinance "effects a transfer of value from landlords to tenants," the Court of Appeal stated that as long as the controlled rents were "fair and reasonable," the transfer of value in question was "justified by a rational governmental purpose" and "[t]he fact that used mobile homes in Escondido are selling for more than they have in the past is irrelevant." App. A, at 13-14.

After the California Supreme Court denied petitioners' Petition for Review (*see* Appendix B to the Petition for Certiorari), petitioners then sought review in this Court.[5] Certiorari was granted on October 15, 1991.

SUMMARY OF ARGUMENT

1. The rent control provisions of the Ordinance, in conjunction with the restrictions that the Mobilehome Residency Law places upon park owners' right to evict current tenants (or refuse new ones), give tenants the right to occupy petitioners' property in perpetuity as long as they pay the controlled rent and refrain from violating applicable laws and regulations. Consequently, the Ordinance, together with the Mobilehome Residency Law, authorizes the "permanent physical occupation" of petitioners' property and effects a "taking" within the meaning of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court of Appeal, in the decision under review, failed to appreciate that it was the *combination* of the Ordinance and the Mobilehome Residency Law which effects a "taking" within the meaning of *Loretto*. The Court of Appeal also erred in concluding that petitioners, by renting their property to tenants *before* the Ordinance was enacted, had consented

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[5] *Amici* do not deal with the questions raised by petitioners' parallel action in the United States District Court for the Southern District of California, which is discussed in the Petition for Certiorari at 25-30.

to the permanent occupation of that property which the Ordinance now authorizes.

2. Under *Pennell v. City of San Jose*, 485 U.S. 1 (1988), a rent control ordinance violates the Due Process Clause if it is "demonstrably irrelevant" to its purpose of protecting tenants. Petitioners have stated a claim under the Due Process Clause by alleging that the effect of the Ordinance (in conjunction with the Mobilehome Residency Law) was to increase the price of used mobile homes, so that tenants purchasing used mobile homes after the enactment of the Ordinance may be financially no better off (or even worse off) than they would have been without the Ordinance. In addition, there is good reason to believe (and petitioners should have been allowed to prove) that the Ordinance will actually injure tenants' interests by aggravating housing shortages and creating financial impediments to the acquisition of used mobile homes. Petitioners' Due Process claim should not have been dismissed on the pleadings.

ARGUMENT

I. THE ORDINANCE, IN CONJUNCTION WITH THE MOBILEHOME RESIDENCY LAW, AUTHORIZES A PERMANENT PHYSICAL OCCUPATION OF PETITIONERS' PROPERTY AND IS THEREFORE A "TAKING" FOR WHICH THEY MUST BE COMPENSATED

As this Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Because the Ordinance and the Mobilehome Residency Law, operating together, grant tenants a *perpetual* right to occupy land owned by the petitioners—an interest which can actually be sold—the effect of those enactments is to give tenants a "complementary estate[]" in petitioners' land—analogous to an easement—and thus

to "take" petitioners' property within the meaning of *Loretto*. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1276-1280 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988).

The Mobilehome Residency Law places stringent limits upon the rights of park owners to evict current tenants. § 798.56. And if current tenants sell their mobile homes to third parties, the park owner must accept the purchaser as a new tenant unless the purchaser is either unable to pay the rent or demonstrably unlikely to comply with the rules and regulations of the park. § 798.74. Standing alone, those provisions may not authorize a "permanent physical occupation" of the park owner's property, because the park owner may evict current tenants (or refuse to accept new tenants) who are unable to pay the rent fixed by the park owner. §§ 798.56 (e)(1), 798.74(a). However, with the addition of the Ordinance, which fixes rents at a specified level and prohibits any increase unless authorized by the Board (§§ 29-103, 29-104), park owners effectively lose the right to exclude either current or future tenants from the park. As the Ninth Circuit observed in discussing a similar ordinance, "tenants are given an indefeasible right to possession so long as they pay the controlled rent and behave themselves." *Hall*, 833 F.2d at 1277.

As this Court held in *Loretto*, it is irrelevant that the enactments in question authorize physical occupation of petitioners' property by private tenants, rather than the City itself. That was the situation in *Loretto*. As this Court there said: "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." 458 U.S. at 432-433, n.9. Nor is it relevant that park owners may apply to local governmental authorities for a permit to change the use of the park. *See* Mobilehome Residency Law, § 798.56(g). They may well be unable to obtain such permits, and even if they can, this Court made it clear, in *Loretto*, that a landlord's ability to end the occupation of his property by ceasing

to rent it does not make that occupation any less a "taking."[6] Finally, it is also irrelevant, as the Ninth Circuit pointed out in *Hall*, that the Ordinance "might someday be repealed. A governmental taking can always be undone if the government so chooses. That has never defeated a taking claim." 833 F.2d at 1277.[7]

The Court of Appeal, in its decision below, held that there had been no physical taking of petitioners' property, within the meaning of *Loretto*, because (1) it did not believe that laws which permit a landlord to evict tenants only for "good cause" can effect a taking (App. A, at 18-19), and (2) it believed that in light of *F.C.C. v. Florida Power*, 480 U.S. 245 (1987), the fact that park owners originally elected to use their land for rental purposes meant that they had not been *compelled* to use it for such purposes. App. A, at 25-27. These contentions, however, are not adequate to support the court's conclusions.

The Court of Appeal held (App. A, at 18-19) that

> [i]f mobile home park tenants in Santa Barbara or Escondido possess any rights to "permanently occupy" the landlord's property, those rights derive not from a rent control ordinance but from the state Mobilehome Residency Law which limits the circumstances under which a landlord may terminate a tenancy, imposing a "good cause" standard. No case we are aware of has remotely suggested that such a regulation of the landlord-tenant relationship constitutes a compensable taking within the meaning of *Loretto*.

[6] "It is true that the landlord could avoid the requirements of [the statute at issue] by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439, n.17.

[7] For example, in *Loretto*, the fact that the offending statute could have been repealed at any time did not prevent this Court from finding "a permanent physical occupation authorized by government. . . ." 458 U.S. at 426.

But petitioners here have not argued that requiring them to have "good cause" for evicting tenants would, in and of itself, authorize the "permanent physical occupation" of their property. Clearly, it would not (and there will be no cases suggesting that it would) because no tenant remains forever. Rather, as explained above, it is the *combination* of restrictions on evicting current tenants (§ 798.56 of the Mobilehome Residency Law), restrictions on refusing to accept *new* tenants (§ 798.74 of the Mobilehome Residency Law), *and* rent control (§§ 29-103 and 29-104 of the Ordinance) which, together, have effected a "permanent physical occupation" of petitioners' property. Every federal court of appeals which has considered the issue has held that such restrictions, in combination, do constitute a physical "taking" of property within the meaning of *Loretto*. *Hall, supra; Pinewood Estates v. Barnegat Township Leveling Bd.*, 898 F.2d 347 (3d Cir. 1990); *Azul Pacifico, Inc. v. City of Los Angeles*, 1991 U.S. App. LEXIS 26335 (9th Cir. 1991).[8]

The Court of Appeal below further held that under *F.C.C. v. Florida Power, supra*, " 'the element of *required acquiescence* is at the heart of the concept of occupation' "

[8] The Court of Appeal below asserted that "[s]imilar ordinances have repeatedly withstood challenges alleging facial unconstitutionality," citing *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261 (1984), *appeal dismissed* 471 U.S. 1124 (1985), and *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 1 (1975). App. A, at 21. However, in *Fisher*, neither the appellants (in their Jurisdictional Statement) nor the California Supreme Court addressed the issue as to whether a "physical taking" had occurred. *Loretto* was not even mentioned. Similarly, in *Hutton Park* (which was decided prior to *Loretto*), the New Jersey Supreme Court did not discuss the "physical taking" issue. And *Pennell v. City of San Jose*, 485 U.S. 1 (1988), which the Court of Appeal relied upon to demonstrate that this Court has upheld the constitutionality of similar enactments (App. A, at 10), involved a rent control ordinance which did *not* restrict the landlord's right to increase the rent upon the departure of the current tenant. 485 U.S. at 5, n.2.

and that because petitioners have not been "required to acquiesce in the occupation of some or all of their property by third persons . . . ," petitioners' property has not been taken within the meaning of *Loretto*. App. A, at 25-27. (Emphasis in original). However, in *Florida Power*, the statute in question merely regulated the rent that utility companies could charge for the use of their poles and did *not* require them to let others use those poles. 480 U.S. at 251. The Court expressly reserved the issue as to whether *Loretto* would apply "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." 480 U.S. at 251-252, n.6. In the present case, while petitioners may originally have elected to use their property for rental purposes, the passage of the Ordinance has effectively required them to "renew, or refrain from terminating" that arrangement and thus comes squarely within the ambit of *Loretto*.

In short, it is clear that the Ordinance, as it operates in conjunction with the Mobilehome Residency Law, has authorized a "permanent physical occupation" of petitioners' property within the meaning of *Loretto* and is therefore a "taking" for which the Takings Clause requires "just compensation."

II. THE TRIAL COURT ERRED IN DENYING PETITIONERS THE OPPORTUNITY TO PROVE THAT THE ORDINANCE IS "DEMONSTRABLY IRRELEVANT" TO THE PURPOSES THAT IT WAS DESIGNED TO SERVE AND THEREFORE VIOLATES THE DUE PROCESS CLAUSE

As this Court held in *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988), state price-control regulations are unconstitutional, under the Due Process Clause, "'if [those regulations are] arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is

free to adopt.'"[9] In the present case, petitioners have alleged (but were denied the opportunity to prove) that the Ordinance, in conjunction with the Mobilehome Residency Law, not only deprives them of property, but is "demonstrably irrelevant" to the purposes for which it was enacted and may actually *frustrate* those purposes. *See, e.g.*, Complaint, paras. 7-8 (alleging that the effect of the Ordinance was to increase the price of used mobile homes); Points & Authorities in Opposition to Demurrer, at 14-16 (arguing that the Ordinance "is not reasonably related to the effectuation of a substantial government purpose").

As the Court of Appeal below acknowledged, "[n]o one can dispute that Escondido's rent control ordinance . . . effects a transfer of value from landlords to tenants." App. A, at 13-14. The imposition of rent control reduces the expected rental income from the property and thus lowers its resale value.[10] "The critical question is whether such a transfer can be justified by a rational governmental purpose . . . ." App. A, at 14. But while the purpose of rent control is to *protect* the interests of tenants,[11] the order of the trial court has prevented petitioners from proving that the Ordinance, in conjunction with the Mobilehome Residency Law, actually *impairs* the interests of purchasing tenants by increasing their costs and transferring the benefit to the sellers of mobile homes who leave them on the premises.

First, as petitioners have alleged, and are prepared to show, tenants selling their mobile homes are able to charge the purchasers for the privilege of secure tenure

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[9] Citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770 (1968).

[10] Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 423-424 (1988).

[11] *Pennell*, 485 U.S. at 13.

at controlled rents, and are able to collect that charge by adding it to the price of the mobile home. As the Third Circuit recently explained in discussing a similar ordinance:

> a tenant [selling his or her mobile home] . . . may command a premium for the alienation of the right to occupy the pad at a controlled rent to the complete exclusion of the [park owners]
>
> * * * *
>
> The premium can be extracted because of the absence of vacancy decontrol for if there were no controls the park owners would, at least in theory, increase the rents to the level that would eliminate the willingness of a new purchaser to pay a premium to locate the mobile home in the park.

Pinewood Estates, 898 F.2d at 353. *See also Hall*, 833 F.2d at 1276 (same); Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 425 (1988) (pointing out that "when rent controls are imposed, the value of [mobile home] coaches owned by sitting tenants increases" and that "[t]his increase results from the capitalization of the rent control ordinance which has reduced pad rents for the foreseeable future").[12]

Indeed, a recent study of mobile home sales in forty California cities indicates that any tenant who purchases a mobile home in a mobile home park *after* the enactment

[12] This case is therefore quite different from *Pennell, supra*, which involved rent controls on apartment buildings. With apartment (as opposed to mobile home) rent control, the outgoing tenant cannot charge the incoming tenant a "premium" for the privilege of having rent control. *Pinewood Estates*, 898 F.2d at 355; Hirsch & Hirsch, 35 UCLA L. Rev. at 425; *Hall*, 833 F.2d at 1278 (distinguishing this Court's prior rent control cases on that basis). Moreover, in *Pennell*, there were no restrictions on the rent that the landlord could charge the incoming tenant. 485 U.S. at 5, n.2. Thus, the outgoing tenant had nothing to sell.

of a rent control ordinance can expect to pay approximately 32% more than he or she would have had to pay *prior* to the enactment of the ordinance. Hirsch & Hirsch, 35 UCLA L. Rev. at 443. Consequently, "after the institution of rent control, a resale tenant may have lower rent payments, but higher mortgage payments for exactly the same quality and quantity of housing that existed before rent control." *Id.* at 448. The result may well be (and petitioners should have been given the chance to prove) that tenants who purchase mobile homes after the enactment of the Ordinance are no better off financially—or even worse off—than they would have been without rent controls. Moreover, even if incoming tenants do not actually suffer financial loss as a result of the Ordinance, a significant increase in the price of used mobile homes "may well hinder rather than assist lower-income families seeking . . ." to obtain such homes. *Hall*, 833 F.2d at 1281.

Second, the history of the impact of mobile home rent controls in California bears out the prediction of standard economic theory that rent control ordinances will cause a reduction in the quality and quantity of available rental housing.[13] As Hirsch and Hirsch have pointed out,

> [s]ince the imposition of mobile home rent controls in California, *virtually no new parks and pads have been constructed. Whereas 60% of all mobile home park spaces in existence today were constructed between 1960 and 1970, only 4% of total mobile home park spaces have been constructed since 1980 when mobile home rent controls began in earnest.* The fact is that very few new mobile home parks are being developed and a major reason appears to be the severity of mobile home rent controls.

Hirsch & Hirsch, 35 UCLA L. Rev. at 463. (Emphasis added; footnote omitted). If the effect of the Ordinance has indeed been to reduce the amount of mobile home

[13] *See Hall*, 833 F.2d at 1281, n.26.

spaces available, that result will not "benefit" the tenants that the Ordinance was designed to protect.

In short, petitioners should have been given the opportunity to prove that the Ordinance, which takes valuable property interests from them, is "demonstrably irrelevant" and even antithetical to the purposes for which it was enacted. Petitioners have therefore stated a claim under the Due Process Clause, and the trial court erred in granting the City's Demurrer.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the briefs of petitioners and other *amici*, the decision of the Court of Appeal should be reversed, with appropriate instructions to the trial court.

Respectfully submitted,

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November 1991

(10)

No. 90-1947

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN K. YEE AND IRENE S. YEE, H.N. AND FRANCES C. BERGER FOUNDATION, MOUNTAIN SHADOWS MOBILE HOME ESTATES, RICHARD C. KUEBLER, d/b/a MOONGLOW MOBILE HOME PARK, CASA DE AMIGOS MOBILE HOME ESTATE, VISTA VERDE, LTD., IMPERIAL ESCONDIDO MOBILE ESTATES and MILDRED D. TACEY,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS SUBMITTED BY MANUFACTURED HOUSING ASSOCIATION IN NEW JERSEY, INC.

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QUESTIONS PRESENTED

I. Is there a physical taking in contravention of petitioners' Fifth Amendment Rights as a result of the combination of the mobile home park tenancy protection laws and rent control, which gives tenants a permanent estate in the land of the landlord which can be sold to third parties?

II. Does the vacancy control aspect of mobile home park rent control substantially advance a state interest? Is vacancy control a violation of petitioner's Due Process rights?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN K. YEE AND IRENE S. YEE, H.N. AND FRANCES C. BERGER FOUNDATION, MOUNTAIN SHADOWS MOBILE HOME ESTATES, RICHARD C. KUEBLER, d/b/a MOONGLOW MOBILE HOME PARK, CASA DE AMIGOS MOBILE HOME ESTATE, VISTA VERDE, LTD., IMPERIAL ESCONDIDO MOBILE ESTATES and MILDRED D. TACEY,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS SUBMITTED BY MANUFACTURED HOUSING ASSOCIATION IN NEW JERSEY, INC.

INTRODUCTION

This brief is submitted on behalf of Manufactured Housing Association in New Jersey, Inc., as Amicus Curiae in support of petitioners' case on appeal. It is alleged that in California, mobile home park rent control, combined with mobile home park tenancy protection,[1] transfers an estate in land from landlord to tenant, without compensation, in violation of petitioners' Fifth Amendment rights. That same taking is occurring in New Jersey's rent controlled communities.

[1] By "tenancy protection" we refer not only to the legislation which prohibits eviction, which is not in issue considered by itself. Here, the "protection" also gives the tenant the right to remain in possession himself *and* transfer possession to another third party with little input or discretion on the part of the landowner.

INTEREST OF *AMICUS CURIAE*

The Manufactured Housing Association in New Jersey, Inc. ("N.J.M.H.A.") is a non-profit organization representing the interests of the mobile (manufactured) home industry, including manufacturers, distributors, suppliers, insurers and financiers. Mobile (manufactured) home park owners comprise a majority of the Association's membership. This includes 148 mobile home parks (land-lease communities), including approximately 18,459 rental mobile home spaces. Rent control is prevalent in New Jersey's mobile home park communities. Tenancy protection laws exist statewide in New Jersey. The N.J.M.H.A., acting for its members, believes the issues presented to this Court by *Yee v. City of Escondido* are identical to issues being litigated presently by its members in New Jersey's State and Federal Courts.

SUMMARY OF ARGUMENT

I.

THE COMBINATION OF STATE TENANCY PROTECTION STATUTES AND LOCAL RENT CONTROL, RESULTS IN A PHYSICAL TAKING VIOLATIVE OF PETITIONERS' FIFTH AMENDMENT RIGHTS.

This case deals with the violation of petitioners' constitutional rights that occur when the City of Escondido Rent Control Ordinance (Escondido Municipal Code, Article V, Sections 29-101 through 29-108) is superimposed onto the California Mobilehome Residency Law (Cal. Civ. Code Section 798 et seq.).

This is not a case challenging the legitimacy of rent control. This is not a case challenging the legitimacy of state anti-eviction acts. Rather, this case deals with what happens when the two are combined; the effect or the interplay of continuing rent control and tenancy protection acts and their impact on the property rights of the

owner of a mobile home park. The issue is the absence of vacancy decontrol, which would, if made part of the rent control ordinance, eliminate the effects of rent control when the tenancy protection scheme is relied upon by the tenant.

It is argued that the tenancy protection law here in issue, i.e., that which allows the departing mobile home park tenant the right to sell his personal property on a designated part of the landlord's real estate, when combined with rent control regulations which prohibit rent increases upon resale, results in a taking. The tenant has been given certain possessory rights in the landlord's property. The right to sell his home on-site transfers the possessory right permanently to the tenant. It transfers to the tenant the right to devise an interest in the land. The right to sell it to a third party at controlled rates creates an artificial premium. The tenant is given rights similar to those of the landowner, i.e., the right to choose new occupants, and the tenant can now sell that right, or collect rent, capitalized as an artificial part of his mobile home sale price, as a result.

At issue are the bundle of rights afforded the owner of property under our Constitution, and how that bundle of rights has been severed; how a tenant in a mobile home park acquires a right in the landlord's property extending beyond the tenant's temporary right to possession.

This case deals with the inverse condemnation of property, the physical invasion and taking of property, and property rights, theretofore vested in the landlord, and now, by virtue of the laws in question, vested in the tenant. Finally, at issue are the combined effects of governmental mandate--a state statute, *and* a local rent control ordinance which impact so as to deprive the owner of the property of some of his constitutionally protected bundle of rights.

This taking is not justified by the substantial advancement of any State interest, nor is it paid for by any compensation.

II.

TRANSFERRING AN ALIENABLE POSSESSORY INTEREST IN A MOBILE HOME PARK WHICH CAN BE SOLD BY A TENANT IS NOT RATIONALLY RELATED TO THE VALID STATE INTERESTS IN RENT CONTROL OR TENANCY PROTECTION, AND THEREFORE, IS VIOLATIVE OF DUE PROCESS.

There may be a valid public purpose behind rent control, i.e., maintenance of low-cost housing and avoiding the forced dislocation of low-income residents. There may be a valid public purpose in permitting the sale of mobile homes on-site in an existing mobile home park. A tenant's home on-site is worth more than off-site. There is no legitimate State interest in allowing tenants to charge artificially high resale prices (which defeats the purpose of maintaining low-cost housing) to incoming tenants, which is attributable to controlled rents. That only serves to change the beneficiary of the value of the scarce locational value of the mobile home space. This does not substantially advance a State interest, has no rational nexus to the State or Municipal scheme in question, and therefore, violates the landlord's Due Process rights.

ARGUMENT

I.

THE RENT CONTROL REGULATION OF THE CITY OF ESCONDIDO COMBINED WITH CALIFORNIA'S MOBILE HOME RESIDENCY LAW RESULTS IN A PHYSICAL TAKING OF PETITIONERS' PROPERTY WITHOUT JUSTIFICATION OR COMPENSATION.

A. Introduction

Petitioner owns and operates a manufactured housing community, commonly known as a mobile home park

("Park"). The residents of the Park own their individual mobile homes, and rent spaces from the Petitioner. "Mobile homes are mobile only in the sense that they are not permanently anchored to a foundation. However, many mobile homes have no wheels and bear no other close resemblance to a motor vehicle." *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1273 (9th Cir. 1987) *cert. denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) "While tenants are free to remove their mobile homes when they move, in practice they rarely do so . . . Tenants typically sell their homes to buyers who then succeed them as tenants of the mobile home park." *Id.* at 1273.

Petitioner as a Park owner has been impacted by two separate and distinct governmental enactments. Neither of these enactments reference the other, neither take into account the effect one has upon the other, or collectively upon the owner as landlord. The gravamen of the Petitioner's Complaint is the *collective* effect of the two. Neither enactment, working independently of the other causes the taking or condemnation to occur as complained of. Rather, the combined effect, the imposition of local rent control upon tenancy protection laws, triggers the inverse condemnation.

The Escondido Municipal Code, Article V, §29-103 provides that an owner cannot increase rents without Rent Review Board approval.

Sections 29-107 and 29-108 of the Municipal Code provide that a tenant may refuse to pay any rent in excess of the maximum rent permitted by Article V, and that any such "excess" rent is illegal.

Section 29-106 of the City's Code provides that a tenancy which is not subject to the provisions of the State mobile home residency law shall not be terminated, except for one or more of the specifically authorized reasons.

The California Mobilehome Residency Law (Cal. Civ. Code §798 et seq. (West's 1982)), speficially §§798.55, 798.56 & 798.74, protects tenants from eviction from a mobile home park and requires the approval of a purchaser of a mobile home that will remain in the park if the purchaser has the financial ability to pay the rent and does not have a prior tenancy history indicating he or she will not comply with the rules and regulations of the park.

The effect of the California Mobilehome Residence Law is that a Park owner is prohibited from having tenants remove mobile homes when they decide to leave the mobile home park. They can sell it and leave it on the landlord's scarce mobile home space. Further, the Park owner, subject to financial review of the buyer of the home, must accept a new tenant who will now reside in the mobile home of the previous tenant. The effect of the Municipal Code is to prevent the Park owner from raising rent except as may be approved by the Rental Review Board of Escondido.

The same combination of State Law, *N.J.S.A.* 2A:18-61.1 and *N.J.S.A.* 46:8C-1, *et seq.*, and municipal rent control ordinance exist in New Jersey, in numerous municipalities. *E.g., Pinewood Estates v. Barnegat Tp.*, 898 F.2d 347 (3rd Cir. 1990).

No allowance is permitted to adjust or raise the rent when the new tenant takes occupancy of the mobile home, hence the term "vacancy control". The new tenant simply "steps into the shoes" of the previous tenant. The Petitioner asserts that since no right of "vacancy decontrol" exists, a departing tenant is paid a measurable premium, in excess of the amount paid for mobile homes in non-rent controlled Parks, for the same or similar mobile home, or in excess of the market value of the home, as measured by the Kelley Blue Book for mobile homes. See *Azul Pacifico u City of Los Angeles*, 740 F.Supp. 772,

778 (C.D. Cal. 1990), aff'd., ___ F.2d ___ (9th Cir., No. 90-55853 and 90-56066, November 1, 1991). The Petitioner further asserts that the premium is derived from the owner's bundle of property rights, that this right has been severed, and by effect of dual government mandate, the owner's property has been taken and turned over to the tenant, and the tenant's successors. The property right in question is the right to exclude others. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3145, 97 L.Ed.2d 677 (1987). It also involves the right to devise property. *Hodel v. Irving*, 481 U.S. 704, 716, 107 S.Ct. 2083, 2084, 69 L.Ed.2d 1 (1981). The tenant has been given a superiority of right in this regard over the right of the landowner. See, *Kaiser-Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). The property is now the subject of a commonality of use and profit. It is a physical presence, not acquiesced in by the landlord, which has been transferred to the tenant, including the right to use and dispose of. It is a physical taking.

The effect is a deprivation of property, without due process of law, for public use, and without just compensation, a violation of the Fifth Amendment to the United States Constitution. (The "Takings Clause," U.S. Const. Amend. V.)

The fact pattern as exists in *Yee*, is practically indistinguishable from other mobile home parks in California, as well as nationwide, where the duality of local rent control and state mobile home tenancy protection statutes are in effect.

In *Pinewood Estates of Michigan v. Township of Barnegat*, 898 F.2d 347, 352 (3rd Cir. 1990), Judge Greenberg succinctly summarized the factual pattern that exists in New Jersey:

". . . Here, there has been a permanent transfer of the appellants' possessory interests to each tenant to occupy a rent controlled pad. Thus, although the interest belongs to the appellants, the landlords, the effect of the law is to transfer the interest, without compensation, from the landlords to the tenants. Accordingly, a tenant may, by determining the purchaser of his mobile home, select the new tenant for the park and command a premium for the alienation of the right to occupy the pad at a controlled rent to the complete exclusion of the appellants. The combined impact of the statute and the ordinance operates to deprive the appellants of their possessory interest in the pad permanently.

The existence of "vacancy control" is dispositive. Because of it, the possessory interest can be sold by the tenant or the "estate" (the valuable right to use and dispose of the interest in the land) can be transferred or devised to his family members, heirs, friends, etc. What he has to sell, above the free-market value of his mobile home, is the landlord's scarce mobile home space. With vacancy *de*control, the landlord could realize its value in higher rent. The higher rent is being paid either way but without vacancy decontrol it is paid to the departing tenant who capitalizes it in the inflated resale value of his personal property, i.e., his mobile home.

The premium, derived from the Park owner's property interest, has an established market and market value. The market value has been quantified in those cases preceding *Yee*, including *Hall, supra*, and *Azul Pacifico, supra*.

The owner of Pinewood Estates, now proceeding with their trial on remand before the District Court in New Jersey, has submitted an expert report, utilizing the same expert as was used in *Hall* and *Azul Pacifico*. The report confirms a phenomenon, not limited to California, that "there is an identifiable differential or 'premium' paid for

mobile homes in Rent-controlled mobile home parks", *The Effects of Rent Control on Market Sales Price of Mobile Homes in Place in Mobile Home Parks in Selected New Jersey Communities*, May 24, 1991, by Dr. William N. Kinnard, Jr., SREA, MAI, CRE, ASA, Page 41. See also Hirsch & Hirsch, "Legal-Economic Analysis of Rent Controls in a Mobile Home Park Context: Placement Values and Vacancy Decontrol", 35 U.C.L.A. L.Rev. 399 (1988). In the report completed by Dr. Kinnard, the indicated typical or average amount of measurable differential or "premium" is an increase of $11,000 per mobile home, or $8.25 per square foot of mobile home living area. This represents approximately 25% of the price paid, or 19% of sales price per square foot of living area. "This measurable differential is indeed a systematic market phenomenon which has virtually no probability of having occurred by chance. The calculated probabilities of this having been a chance occurrence are less than 1 in 1,000." *Id.* at 41.

This effect is not evident in mobile home parks where residency laws exist in the absence of rent control. This effect is not evident in apartment rentals. As the court noted in *Pinewood Estates, supra* at 354. The effect was found to exist in the *Pinewood* case because of the provisions of the Barnegat Township Rent Control Ordinance.[2] The Township of Barnegat, New Jersey, has adopted a rent leveling ordinance, Ordinance No. 1977-19, which controls mobile home space rentals. Section 64.2 of the Barnegat Ordinance establishes a formula for determination of rent. It is set forth in detail in the appendix.

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[2] The Township of Barnegat, New Jersey has adopted a rent leveling ordinance. Ordinance No. 1977-19, which controls mobile home space rentals. Section 64.2 of the Barnegat Ordinance establishes a formula for determination of rent. It is set forth in detail in the appendix, at p. 1a.

Thus, the effect of the two enactments, local rent control and tenancy protection laws have a unique legal impact on the owner of a mobile home park. Others have the right to use the property with little say from the landlord, and existing tenants have the right to charge for it. As Judge Greenberg called it in *Pinewood,* it is the ". . . uncompensated creation of interests . . ." in land for the benefit of the tenants. It is actually a "transfer," as opposed to a creation, since the landowner had the right prior to the enactment of the challenged regulations. *Pinewood, supra,* at 355.

B. Treatment of the *Yee* Taking Claim as a Physical Taking Is Consistent with This Court's Prior Cases.

1. The Requisites for a Physical Taking Are Present in *Yee.*

As explained in *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982), the distinction between the two types of taking lies in the fact that "a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause", *Id.* at 433, 102 S.Ct. at 3171. Indeed, "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine", at 432, and "without regard to the public interest that it may serve", *Id.* at 426.

> "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it'. *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed 311 (1945). To the extent that the government permanently occupies physical property, it effectively destroys each of these rights." *Loretto, supra,* at 435, 102 S.Ct. at 3176.

It is of no moment that the government has not taken possession, but has coerced the possession by a third party instead. *Id.* at 432, 102 S.Ct. at 3174, n.9; *Nollan, supra,* at 832, 107 S.Ct. at 3145.

Here the court is faced with the unique combination of the transfer to a tenant of all of the right to exclude others, *Loretto, supra,* at 435, 102 S.Ct. at 3175, *Nollan, supra,* at 832, 107 S.Ct. at 3145, *Kaiser-Aetna, supra,* at 179-80, 100 S.Ct. at 392-93, and the right to devise it. *Hodel v. Irving,* 481 U.S. at 717-718, 107 S.Ct. at 2084. The tenant can also, and often does, sell it. Thus, as a result of the permanent physical occupation, clothed with all indicia and benefits of ownership above, there is not only a transfer of an alienable interest in the land to the tenant, but the tenant is clearly being compensated as a result, not the landowner who is deprived of his rights of alienation.

In reviewing rent control cases, this court has consistently stated that "statutes regulating the economic relations of landlord and tenants are not *per se* takings", *FCC v. Florida Power*, 480 U.S. 245, 251, 107 S.Ct. 1107, 1112, 94 L.Ed.2d 282 (1987), and draws a distinction between the invitation given to a lessee and an interloper with a government license. The former, where a lessee is involved, is typically reviewed under regulatory taking criteria. Only the latter, where an interloper with a government license is involved, has been reviewed as physical possession or physical taking cases.

Thus, in order to establish a physical taking case, particularly where rent control is involved, it would appear that a Plaintiff must evidence a combination of physical occupation, that is permanent, authorized by government, without regard to the public interests that it may

serve (see *Loretto*, at 434-35, 102 S.Ct. at 3176), where such occupation is by an interloper or third party, and lastly, that is not consensual in nature, *Florida Power, supra*, at 252, 107 S.Ct. at 1112.

2. The Facts in *Yee* Have Never Been Considered by This Court.

Yee's cause of action evidences each of the requisite factors for a physical taking, thus making it ripe for this court's determination. Prior cases have been unable to reach the merits of this issue due to procedural defects, or because the requisite factors, identified previously, were missing.

In *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988), the court was asked to review the rent control ordinance enacted by the City of San Jose. A landlord seeking a rent increase pursuant to its terms would be required, upon tenant objection, to submit the increase request to review by a mediation hearing officer. No tenancy protection law was involved.

The Ordinance sets forth a number of factors to be considered by the hearing officer in making this determination, including "the hardship to a tenant." *Id.* at 4, 108 S.Ct. at 853. Pennell asserted that the factor of the "hardship to a tenant" accomplished "a transfer of the landlord's property to individual hardship tenants;" *Id.* at 9, that "the Ordinance forces private individuals to shoulder the 'public' burden of subsidizing their poor tenants' housing", *Id.* at 9. This court found that the claim was premature, as the suspect provision of the ordinance, allowing the hardship of a tenant to be considered, had not then actually been considered by a Mediation Hearing Officer. *Id.* at 4, 108 S.Ct. at 856.

Of interest, Justice Scalia, with whom Justice O'Connor joined, concurring in part, and dissenting in part, asserted that he would find that consideration of tenant hardship effects a taking of property without just compensation. The dissent acknowledged that the City may constitutionally set a 'reasonable rent' according to the statutory minimum. "Appellants only claim is that reduction of a rent increase below what would otherwise be a 'reasonable rent' under this scheme may not, consistently with the Constitution, be based on consideration of the seventh factor—the hardship to the tenant as defined in §5703.29. I think they are right." *Id.* at 21, 108 S.Ct. at 862. He found no justification for imposing this venerable societal aim on one unrelated segment of society, i.e., landlords.

In *Fresh Pond Shopping Center, Inc. v. Rent Control Board of Cambridge*, 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983) the Court dismissed the case for want of a substantial federal question. At issue was a tenancy protection statute. The tenants' rights could not be transferred to another tenant in that case. The possessory interest could not be disposed of by the tenant. No issue of rent control (i.e., rate regulation) was involved either. That case is inapposite.

In *Fresh Pond*, a landlord's right to personally occupy a rental unit was circumscribed both by the Rent Control Board of Cambridge and an enabling state residency protection statute. The local Ordinance, according to Justice Rehnquist, in his dissenting opinion "delegates virtually unfettered discretion to the Board to determine whether to grant a removal permit." *Id.* at 876, 104 S.Ct. at 219.

Justice Rehnquist noted that "the *combined* effect of the limitations imposed by the state enabling statute and Ordinance 926 is to deny appellant use of his property." . . . *Id.* "In my view this deprives appellant of the use of its property in a manner closely analogous to a perma-

nent physical invasion, like that involved in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) . . . . *Id.* at 877, 104 S.Ct. at 219. "As the Cambridge ordinance operates in this case, I fail to see how it works anything but a physical occupation of appellant's property. First, appellant's right to evict the tenant was limited by state law to two circumstances: occupation of the rental unit by the owner or certain members of his family, or demolition. The first of these rights is not available to appellant. The second, demolition, is controlled by Cambridge Ordinance 926, and under the administration of that ordinance by the Cambridge Rent Control Board, appellant has been denied the right to remove the unit from the housing market by demolition. It is not certain whether the Rent Control Board would, if the tenant decided to leave, determine that a demolition permit should issue, but it is clear that until the tenant decides to leave of his own volition, appellant is unable to possess the property." *Id.*

Of importance to Justice Rehnquist in his analysis there was the fact that the power to end or terminate the physical invasion was under the control of a private party.

In *Fresh Pond*, Justice Rehnquist first noted how the *combined* effect of the state residency statute and local residency ordinance effected a taking. However, *Fresh Pond* did not consider the *combined* effect of a tenancy protection statute *and* a local ordinance effecting *rents.* Nor did it consider a rent control scheme. Thus, the dismissal in *Fresh Pond* for want of substantial federal question is not dispositive of the *Yee* case, where the combined effect of rent control, and tenancy protection is directly in issue.

C. *Florida Power* Has Been Incorrectly Applied by Respondent, City of Escondido; It Is Inapposite.

The Respondent, City of Escondido, has raised the case of *F.C.C. v. Florida Power, supra*, as somehow being

dispositive of *Yee*. Respondent, further asserts that because the Court of Appeals in *Pinewood Estates*, failed to take into account *Florida Power*, their methodology was defective, and the decision flawed. *Florida Power*, however, does not present an analogous situation to *Yee*. Nor is it related to the issues at hand. Here, the combined effect of rent regulation and tenancy protection is in issue, and it is asserted that this unique combination effects a physical taking. The nature of this type of claim was not only not considered in *Florida Power*, but was specifically noted as being reserved by the Court and hence not adjudicated. *Id.* at 252, 107 S.Ct. at 1112, n.6.

The Court in *Florida Power*, in reviewing the facts, noted the Federal Legislation there under review was a response to complaints from cable operators regarding exploitation by utility companies. As a result of the passage of the law, where a state failed to regulate rates charged by a utility to a cable company, the cable company could seek relief from alleged overcharging before the F.C.C. It could regulate the rates, terms and conditions for pole attachments.

At issue was rate setting, which is equated to rent control. The *combined effect* of rent control and tenancy protection was not in issue.

Respondent forcefully argues that the Landlord's consent to lease, in the first instance, was the key to *Florida Power*, and thus represents binding precedent. This Court recognized a distinction between *FCC* and *Loretto*: "But it is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license. We conclude that the Court of Appeals erred in applying the *per se* rule of *Loretto* to the Pole Attachments Act." *Id.* at 252, 107 S.Ct. at 1112.

The Court left open the precise issue now being raised by *Yee* by not deciding whether a taking occurred where the rights to enter into, renew, or refrain from terminating were not permitted, as was the case under review. *Id.*, n.6.

Respondent would further argue, that the dispositive issue in *Florida Power* was the court's admonition that consent, or the "invitation" to let, excused any Takings argument; that the mobile home park owner in *Yee* has consented to leasing for residential purposes, and once such consent was given, its regulation is not coercive governmental action.

As in many states (including New Jersey, *N.J.S.A.* 2A:18-61.1, *et seq.*), the California tenancy protection statute affords an existing residential tenant the right to continue to let, and eviction is limited to good cause circumscribed by statute. Additionally, because of the unique character of mobile homes, and because of the difficulty of their being moved, mobile home protection statutes have been enacted allowing an existing tenant to sell his mobile home in place to a new tenant. A landlord is typically limited to approving the financial ability of the tenant. Combined with the above enactments, local ordinances have been adopted limiting the rents that a Park owner can impose (City of Escondido Municipal Code, *supra*). No vacancy decontrol is afforded in Escondido's Ordinance, or in similar ordinances reviewed by the courts in *Hall*, *Azul Pacifico*, and *Pinewood Estates*, *supra*.

While Respondent might argue that the landlord in *Yee* consented to the residential letting, consented to both the state tenancy protection law and mobile home protection law, even consented to letting *while* the regulatory limitation of rent control was in effect, no court has *ever* given credibility to the proposition that a landlord has, by such conduct, consented to a tenant's being able to sell the possessory interest, or to the tenant's

successors in interest occupying the property indefinitely, and in perpetuity, and without regard to the effect on the landlord, and his possessory interest in his property. *Florida Power* specifically limited its decision to the facts before it, and did not decide what would happen, if the FCC required utilities "over objection" to enter into, renew, or refrain from the termination of pole attachment agreements. *Id.* at 252, 107 S.Ct. at 1112, n.6. Yet, that is the precise issue in *Yee*. This landlord cannot terminate a lease (except for statutorily defined good cause), nor can he refrain from entering into a new lease with a tenant's successor in interest (except for financial inability of the new tenant), or such succeeding tenants' successors. Additionally, he cannot charge a fair market rent regardless of who the tenant is, now or in the future, without permission from the Escondido rent control board. This court should not hold that a landlord has consented to the combined effects noted above, to persons not yet in being or to the sale of a possessory interest in his property by a third party, on a permanent or continuing basis.

The *Pinewood Estates* court dealt directly with this issue. Referring to a predecessor case of *Troy Ltd. v. Renna*, 727 F.2d 287 (3rd Cir. 1984), the Court of Appeals noted that it had upheld the New Jersey Senior Citizens and Disabled Protected Tenancy Act as a valid regulatory taking, 898 F.2d at 356. The *Pinewood Estates* Court said that the combination of tenancy protection schemes such as that involved in *Yee* and rent control were distinguishable from senior citizen occupancy protection vis-a-vis landlord's rights to convert apartments to condominiums, because the latter regulatory scheme involved no permanency, no public use, and the tenant there had no right to choose the new occupant. The tenancy involved in *Troy* did not acquire the right to transfer possession for consideration. Judge

Greenberg, writing for the court in *Pinewood* pointed out, at 898 F.2d, p. 357:

> Nor is there any tension between this case and the legion of the cases upholding apartment rent control. Two significant differences exist between mobile home regulations now subject to the New Jersey rent control statute and the Barnegat ordinance and the typical urban rent control. First in urban apartment rent control it is the landlord who chooses, selects, and rents to the new tenants. No other party can sell the right to occupy the landlord's premises. Second, the tenant cannot occupy in perpetuity. Thus, the tenant does not acquire an inheritable right; see *Troy*, 727 F.2d at 301.

The Third Circuit's rationale should be adopted by this Court.

To carry this matter to the nth degree, even if it can be argued by Respondent, City of Escondido, that the Yees consented to the letting, with knowledge of state tenancy protection, mobile home tenant protection, and with rent control applicable to successive generations of tenants, it is fanciful to imagine that the landlord consented to a severance of its property rights, depositing said right to exclude, devise and sell possession permanently in the tenant and the tenant's chosen successors.

A further argument, relating to consent is made by Respondent, i.e., the landlord may terminate his "consent," and evict the tenant from his lands, if he decides to devote the land occupied by the tenant to a different use. This is not a realistic possibility. For example, New Jersey permits the eviction of apartment and mobile home tenants where an "owner seeks to retire permanently the residential building or the mobile home park from residential use or use as a mobile home park." *N.J.S.A.* 2A:18-61.1.

However, alternate residential uses are not justification for closing a park. If a commercial use is chosen, the landlord must secure all developmental approvals before eviction. *N.J.S.A.* 2A:18-61.1(b). The landlord must give an eighteen-month Notice to Quit. *N.J.S.A.* 2A:18-61.2(d). If the town, wishing to avoid dislocation of the residents of the mobile home park, zones the land for mobile home use, the commercial development approvals may never be available and the ability to close the park may never exist. In New Jersey it is not a realistic possibility.

This point was recognized in *Loretto*, 458 U.S. at 439, 102 S.Ct. at 3178, n. 17, *Hall, supra*, at 1277-1278, n. 18, and *Pinewood, supra*, at 558.

Thus, *Florida Power, supra*, simply does not deal with the issue at hand. The reliance placed thereon by the Respondent, and its challenge of the decisions in *Pinewood Estates* for not referencing or considering *Florida Power* is erroneous. Contrary to the Respondent's assertions, the issue is *not* simply rent regulation, but the *combined*, and here unique effect, of rent regulation *and* tenancy protection.

The Facts of *Yee* Are Unique, and Have Not Been Previously Considered by This Court. With no direct precedent from this Court, Judge Kozinski, in *Hall*, first comprehended the uniqueness of the *Yee* set of facts. He notes: "Plaintiffs' claim was a novel one: they argued that by giving tenants the right to a perpetual lease at a below-market rental rate, the ordinance transferred to each of them a possessory interest in the land on which their mobile home is located. According to the Halls, this interest has a market value and a market: the market for mobile homes located in mobile home parks. According to the Halls, the price of mobile homes in their park shot up dramatically after enactment of the ordinance, with many selling for above their blue book value. They claim that the substantial premium paid for in parks sub-

ject to the Santa Barbara Ordinance reflects the transfer of a valuable property right to occupy home parks at below-market rates." *Id.* at 1273, 1274.

In his opinion Judge Kozinski states:

> In effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use, whether or not he continues to be a tenant. If the Halls' allegations are proven true, it would be difficult to say that the ordinance does not transfer an interest in their land to others. *Id.* at 1276.

This is the same state of affairs in New Jersey.

D. The State Court Decisions in *Yee* Were Flawed.

The State Court in *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (1990), review den. 1991 Cal. Lexis 353 (Cal. 1991) endeavored to apply the holdings in *Florida Power, supra,* and *Pennell, supra,* and its prior decision of *Oceanside Mobilehome Park Owners' Ass'n v. City of Oceanside*, 157 Cal. App. 3d 887 (1984), but did so incorrectly. By way of specific example, the court cites *Florida Power* as emphasizing the element of consent or required acquiescence by the landlord. Yet it recognized that *Florida Power* reserved on the question of the validity of a regulation which would address the utilities' right to terminate existing lease agreements. 224 Cal. App. 3d at 1358.

The *Yee* court completely fails to recognize that the loss of control over the right to "renew," not only the "right to refrain from terminating," is a key element in creating the permanency, and physical taking. As stated in *Hall* (citing *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)): "The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause." 833 F.2d at 1276.

Moreover, the California court simply did not acknowledge that a taking could occur, independent of the issue of what constitutes fair and reasonable rents. The California Court rationalized that the Yees' complaints never alleged that the Escondido ordinance is irrational because it denied them fair and reasonable rents. 224 Cal. App. 3d at 1354. The Court concluded that without allegations regarding rents below the constitutional minimum, that they could assume the rents provided for by the ordinance were fair, and therefore, there is no taking. *Id.*

In *Hall*, the court directly countered this assertion: "The city's argument that appellants are adequately compensated by the rents they receive is irrelevant to the determination of whether a taking has occurred. See *Troy Ltd v. Renna*, 727 F.2d 287, 300 (3rd Cir. 1984). Whether compensation is adequate is an inquiry separate from whether there has been a taking. In *Loretto*, for example, state law provided for compensation. The Court nevertheless determined that there was a taking through physical occupation. It left it to the state courts to determine whether the compensation provided was adequate." 833 F.2d at 1278.

This Court should not follow the analysis of the *Yee* majority.

E. There Is No Other Compelling Precedent Which Supports or Is Analogous to *Yee*.

The decisions relied upon by the Respondent, City of Escondido, are similarly inapplicable as simply not dealing with the unique taking issue present in *Yee*. No case cited by the Respondent either within the Federal circuits, or those of states outside of California, is apposite to the decisions of *Hall, Pinewood Estates*, and

Azul Pacifico, where the courts uniformly held that a physical taking occurred resulting from the dual effect of state or local tenancy protection acts and local rent control.

In *Eamiello v. Liberty Mobile Home Sales, Inc.*, 208 Conn 620, 546 A.2d 805 (1988), the Supreme Court of Connecticut reviewed the constitutionality of a portion of the State Tenancy Protection Act. The court did not review a combination of two enactments, as in *Yee*, and in fact, no aspect of rent control was before the court. "We conclude that the statute does not unduly harm the economic interest of mobile home park owners. Unlike the ordinance in *Hall v. Santa Barbara*, our statute does not provide for rent control and limit the owner to a below market income." 208 Conn. at 649, 546 A.2d at 819-820.

Although the Connecticut statute allowed a mobile-home tenant to transfer possession to a subsequent tenant, the unique facts raised in *Yee*, i.e., that the rent regulation transferred a premium to the value of the mobile home park being sold, which allows the tenant to collect money for his possessory interest, could not and did not occur. Notably, *Eamiello* was limited to review of a singular statute, not the combination of two laws, working in a manner to create the inverse taking.

Similarly, in the case of *Thompson v. Merlino Enterprises, Inc.*, 208 Conn. 656, 545 A.2d 1094 (1988), dismissed for want of substantial federal question, 488 U.S. 1024, 109 S.Ct. 829, 102 L.Ed.2d 962 (1989), the Connecticut Supreme Court reviewed the right of an Administrator of an estate to sell a mobile home in place to a qualified new tenant. Citing *Eamiello v. Liberty Mobile Homes Sales, Inc.* as precedent (argued on the same day), the court found no taking had occurred simply because an administrator of the tenant could decide who the new tenant would be. *Id.*

While both *Eamiello* and *Thompson* stand for the proposition that a mobile home tenant may select a successor tenant, without constitutional deprivation, none of the considerations initially present before the *Hall* court, or now in *Yee*, were present before the Connecticut Supreme Court. The locational value of the scarce mobile home space has not been transferred to the tenant in those cases, because the landlord can still collect that as part of the new rent he charges to the incoming tenant.

Judge Kozinski, in the recent decision of *Azul Pacifico*, considered the differences of these cases:

> The city argues that our case is just like *Florida Power* because the mobile home tenants and park owners enter into lease agreements voluntarily. But the Court in *Florida Power* stated: 'We do not decide today what the application of (*Loretto*) would be if the FCC in the future case required utilities, over objection, to *enter into, renew, or refrain from terminating* pole attachment agreements. *Id.* at 251-52 n. 6 (emphasis added). This is the situation here, where the RSO [Rent Stabilization Ordinance], read in conjunction with California's Mobilehome Residency Law, has precisely that effect.
>
> An examination of the three factors the Supreme Court highlighted in *Florida Power* supports this conclusion. First, Azul Pacifico is required to enter into agreements; when a tenant vacates and sells a coach, the park owner *must* rent the pad on which it sits to the purchaser. Cal Civ Code 798.74. Second, the park owner *must* renew the pad rental agreement. *Id.* at 798.55, 798.56. Finally, the park owner *must* refrain from terminating such agreements except in sharply circumscribed circumstances.
>
> Standing alone, these requirements of state law may well be constitutional. See, for example, *Eamiello v. Liberty Mobile Home Sales* (citations omitted). But the district court found that the rent and

vacancy control provisions of the city's ordinance in conjunction with the background state law rules operated to transfer Azul Pacifico's property to its tenants, thus violating the takings clause. Memorandum of Decision at 8-9; see also *Pinewood Estates*, 898 F.2d at 348-49 (considering interaction of state and local laws nearly identical to this case).

In *Hall*, we held that the park owners would have a constitutional right to compensation for the taking of their property if they could prove that the [challenged ordinance] has transferred a possessory interest in their land to each of their tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. 833 F.2d at 1276. After careful review of all the evidence, the district court in this case found that each of these elements was satisfied. We review its findings for clear error and find none. ___ F.2d at ___ (slip opinion at p. 8).

The *Yee* court did conclude that a landlord had no complaint if the effect of the rent control regulation is to allow the tenant to charge more for his home. What the court did not realize is that the increased price is attributable to the possessory interest in this landlord's land, not the mobile home. That is the transfer of value. That is the taking. The *Yee* majority erroneously failed to recognize this.

Like the California Court in *Yee, supra*, the Respondent attempts to focus merely on the economic transfer due to vacancy control, without considering the accompanying loss of property rights to the landlord which *are* constitutionally protected. There is no doubt here that the "economic transfer" here is the right to sell the valuable possessory interest in a scarce mobile home pad or site. The "economic transfer" is a transfer of an interest in real estate!

Further, citing *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741, n. 6 (1980), the *Pinewood Estates* court indicates that this Court ". . . has eschewed a literal interpretation of 'property', instead adopting a more expansive approach:

> The term 'property' as used in the Takings Clause includes the entire group of rights inhering in the citizen's [ownership].' It is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercise rights recognized by law. [Instead it] denotes[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . (Citations omitted.) 898 F.2d at 352.

Finally, Respondent, City of Escondido, admonishes the *Pinewood Estates* court for "never considering the public interest in protecting the mobilehome owner's investment" (Respondent's Brief in Opposition to Petition for certiorari, at page 21). Respondent suggests that the *Pinewood Estates* panel's comments about the desirability of "vacancy decontrol" clearly indicated that they were unaware that "mobilehome owners are enclosed within a captive market"; that "park owners have a monopoly" and that "taken collectively the [mobile] homeowners have a greater investment than the [mobile] home park owner."

These concerns were neither ignored, nor ill-considered by the panel in *Pinewood Estates*. An overall reading of the opinion belies the Respondent's assertions. "The fact that our result may have a significant impact on the relationship between tenants and mobile park operators has not escaped our notice. . . ." 898 F.2d at 353. The court could not have been unaware of the significant legislative scheme in New Jersey which affords significant tenancy protection for mobile home park tenants. *N.J.S.A.* 2A:18-61.1, *N.J.S.A.* 46:8C-1, *et*

seq. See also *Metpark, Inc. v. Kensharper*, 206 N.J. Super 151 (Law Div. 1985). The court in *Pinewood Estates* rather was concerned with the substantial intrusion of an owner's property rights.

> "The operation of the Barnegat Ordinance in connection with state law has created valuable *property rights* (emphasis added) for which appellants have not been compensated. Furthermore, if the rather minor intrusion in *Loretto* was deemed a physical invasions then the gross intrusion here must be so classified. This is not a case in which a property owner has simply been told that he cannot do something on his property or the he must use his property in a certain way. The situation is aggravated by the fact that the transfer is accompanied by the payment not to the landlord but to the departing tenant of what amounts to rent for the use of the pad. This 'rent' is for the possessory interest of the landlord. Thus, this is a case where other persons, tenants, have been granted interests in property which property belongs to the appellants, the landlords." *Id.* at 353.

II.

THE ESCONDIDO ORDINANCE PROVISIONS PROVIDING VACANCY CONTROL VIOLATE THE DUE PROCESS CLAUSE.

The rent control ordinance at issue is an improper exercise of the police power in violation of the Due Process Clause. The Fifth Amendment and the Fourteenth Amendment do not prohibit governmental regulation for the public welfare, but do condition the exercise of this governmental power by requiring that the ends sought shall be accomplished by methods consistent with due process. *Nebbia v. People of State of New York*, 291 U.S. 502, 54 S.Ct. 505, 510, 78 L.Ed. 940 (1934). The *Nebbia* Court stated:

> ". . . and the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. *Nebbia v. State of New York*, supra, 54 S.Ct. at pages 510-511.

At a minimum, the vacancy control provisions must have a "real and substantial relationship" to the purpose of the legislation. This court recently described this standard using language which suggests that there may be a more stringent standard when the legislation under review effects a taking of private property without compensation. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), appellants Nollan claimed that the California Coastal Commission violated the Takings Clause of the Fifth Amendment as applied to the States in the Fourteenth Amendment, by issuing a coastal development permit conditioned upon appellants' allowing the public an easement to pass across a portion of their property. The court, noting that uncompensated conveyance by appellants of the easement would violate the Fourteenth Amendment, examined the issue of whether the requirement that the easement be conveyed as a condition for issuance of the land use permit would be permissible. *Nollan v. California Coastal Commission, supra,* at 834, 107 S.Ct. at 3147.

Justice Scalia noted that "[w]e have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests and does not 'den[y] an owner economically viable use of his

land' ", quoting *Agins v. Tiburon*, 447 U.S. 225, 260, 100 S.Ct. 2128, 2141, 65 L.Ed.2d 106 (1980). *Nollan, supra,* at 834, 107 S.Ct. at 3147. The Court reviewed the purposes for the condition and concluded that the Commission's imposition of the condition in appellants' permit could not be treated as an exercise of its land use power for any of the purposes as advanced by the Commission.

The Escondido Ordinance falls far short of either the "substantial advancing of a legitimate state interest" standard or the "real and substantial relation" test, and thus, constitutes an improper exercise of the municipal police power.

Ordinances establishing rent control presumably have the purpose of providing "affordable" housing to tenants. *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). As discussed, *supra,* the Escondido Municipal Code and the California Mobilehome Residency Law combine to deprive mobile home park owners of their constitutionally guaranteed private property rights. The California Mobilehome Residency Law prohibits park owners from forcing tenants to remove mobile homes at the time of sale, and requires the owners, subject to financial review, to accept a new tenant to reside in the mobile home purchased by the tenant which remains on the pad. The Escondido Municipal Code prohibits the owner from raising rent except as approved by the Escondido Rental Review Board. At the same time, since there is no right of vacancy decontrol, a departing tenant exacts, at the time of sale, a measurable premium from the purchaser of the home, which amount exceeds the amount paid for mobile homes in parks not subject to rent control, or in excess of Kelley Blue Book prices for mobile homes. See, *Azul Pacifico v. City of Los Angeles,* 740 F.Supp. at 778-779.

The ability of the selling tenant to exact a premium at the time of sale not only fails to have a real and substantial relationship to the object sought and fails to "substantially advance" a legitimate state interest, it undermines that interest. As the court noted in *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 (9th Cir. 1987):

> "If appellants are able to prove their allegations, it would seem that the Santa Barbara ordinance will do little more than give a windfall to current mobile park tenants. If, as appellants allege, the ordinance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower income families seeking access to the rental units in mobile park homes (sic)."

The ordinance provisions forbidding rent increases or limiting them when a tenant sells or moves from the park does nothing to protect the continued ability of park residents to afford to maintain residency in such parks. The purpose of protecting tenants in possession from being forced out would be achieved as effectively if the landlord is permitted to raise rents when the tenant moves or sells the mobile home. As long as the tenant is protected for the duration of his or her tenancy, the threat of being uprooted due to prohibitive rents is gone.

The Court of Appeals for the Third Circuit characterized the premium paid by the purchasing tenant as "nothing more than rent for the pad which, depending upon whether the purchase is financed or paid for in cash, the new tenant pays for during his tenancy or in advance". 898 F.2d at 355.

Clearly, the Escondido Ordinance, combined with the California Mobilehome Residency Law, operates to defeat, rather than to "substantially advance" the purpose of the legislation. As such, there is no real and substantial relationship between the legislation and its purpose.

Therefore, the Escondido Ordinance violates the Due Process Clause and is an improper exercise of the Police Power.

CONCLUSION

It must be recognized that no single case heretofore cited by the Respondent has dealt squarely with the issue at hand. Be it *Pennell*, or *Fresh Pond*, or *Florida Power*, or the state cases of *Eamiello* or *Thompson*, these courts have simply not been faced with a state tenancy protection act, on to which there is superimposed local rent control.

As indicated, this is neither singularly a rent control case, nor a case challenging tenancy protection. Rather it deals with what happens when the two are combined. With clarity and distinction the courts in *Hall*, *Pinewood Estates*, and *Azul Pacifico*, have enunciated the proper doctrine and methodology to be applied to a physical taking of property by inverse condemnation. By their careful and deliberate reading of this Court's holdings, they have, under the applicable facts, affirmed the requirement, under the Fifth Amendment, that no person shall ". . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation".

The Manufactured Housing Association in New Jersey, Inc., as Amicus in support of Petitioners, request that this Honorable Court grant the relief requested by said Petitioners.

Respectfully submitted,

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November 27, 1991

APPENDIX

BARNEGAT TOWNSHIP
RENT LEVELING ORDINANCE

§64.2. Determination of Rents.

A. The establishment of rents between a landlord and a tenant to whom this ordinance is applicable shall hereafter be determined by the following provisions:

(1) At the expiration of the tenancy for a mobile home space, no landlord may request or receive any increase in the rental income or additional charges for that mobile home space from any tenant, new or continuing, which is greater than a combination of the following:

(a) Any increased cost to the landlord for utilities.

(b) Any increased cost to the landlord in mobile home space fees or license fee charged by the Township of Barnegat pursuant to any duly adopted ordinance.

(c) Any amount equal to three and one-half percent (3½%) of the previous twelve-month rental income for the mobile home space or the percentage increase in the consumer price index over the twelve-month period ending one hundred twenty (120) days prior to the date of the application for said increase, whichever shall be less.

(2) No new or continuing tenant, at the termination of a tenancy, shall suffer or be caused to pay any rent increase for the mobile home space in any twelve-month period which exceeds the above permitted increase for the twelve-month period.

B. No landlord may request or receive of the tenants any increase in rental income or additional charges except as provided by this section and until such time as the landlord shall have obtained approval in writing from the Rent Leveling Board, as hereinafter established, for said increase. Furthermore, there shall be only one (1) request per landlord per mobile home park for any increase per calendar year, for each of the increases permitted by this section, which request and decision shall be binding upon all tenancies of that particular mobile home park which expire during said calendar year. The landlord shall notify the Rent Leveling Board in writing, at least sixty (60) days prior to the effective date, of any increase proposed pursuant to the provisions of this section. At the same time, a copy of said notice shall be mailed by certified mail, return receipt requested, to any tenant who may be affected by the increase applied for. In the event that a landlord shall submit an application for increase or decrease in rent based upon any of the criteria herein, the Rent Leveling Board shall hold a hearing within sixty (60) days of the submission of the completed application.

C. A tenant may be notified by other than certified mail only if the landlord or his representative shall serve the tenant personally with the notice provided for herein and shall certify such service by affidavit and retain such affidavit in his records. Upon receipt of said notice and where the increase sought is based upon the terms of Subsection A(1)(a) or (c) herein, the Rent Leveling Board shall schedule a hearing on said increase and the landlord shall post, in a conspicuous place in or about the park, a notice of said hearing date at least five (5) days prior to the proposed date of hearing. Where the increase sought is based upon the terms in Subsection A(1)(b) herein, no hearing shall be scheduled and the increase

shall become effective on the date specified in said notice if all other applicable provisions of this ordinance are complied with.

D. In the event that a landlord shall make application for any rent increase hereunder or supply any notice to the Rent Leveling Board or any tenant, said application shall include a certification by the landlord that all information supplied in an application or notice is true or accurate.

(Note: There are other provisions of the ordinance which permit capital improvement increases, tax surcharges and reasonable rate of return increases. The ordinance is clear however. It does not allow any increase upon the sale of a mobile home by an existing tenant.)

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Respondent.

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF *AMICUS CURIAE* OF CALIFORNIA MOBILE HOME PARKOWNERS ALLIANCE IN SUPPORT OF PETITIONERS

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No. 90-1947

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

JOHN K. YEE and IRENE S. YEE, et al.,
Petitioners,
vs.
CITY OF ESCONDIDO,
Respondent.

BRIEF *AMICUS CURIAE* OF CALIFORNIA MOBILEHOME PARKOWNERS ALLIANCE IN SUPPORT OF PETITIONERS

The California Mobilehome Parkowners Alliance has received the consent of the parties to file this brief as *Amicus Curiae* in support of the Petitioners and has filed the letters of consent with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

The California Mobilehome Parkowners Alliance is a nonprofit corporation with more than 350 members throughout California. Most of the members are small "mom and pop" type businesses which own only one small mobile home park. Some are now subjected to ordinances like the Escondido ordinance before this Court, while others are threatened with enactment of such ordinances. All have a vital interest in the issues now before this Court.

Philosophical differences between landlords and tenants are hardly new. Nor are they strangers to this Court. However, the "solutions" now being devised by some municipalities (sometimes by city councils, sometimes — as here — by voter initiative measures voted in by the tenants themselves) to perceived problems in the mobile home park setting have gone beyond anything devised for any other residential rental setting. Compulsory, uncompensated transfers of interests in property are becoming commonplace.

The legality of transferring most of the indicia of ownership from mobile home park owners to mobile home park tenants is a serious issue. This *Amicus* is vitally concerned that an answer comporting with constitutional precepts be clearly given so that the state courts in California will understand it.[1]

A decision from this Court outlining appropriate standards could go far toward eliminating litigation which is as voluminous as it is contentious. While mobile homes represent only about 4.5% of California's housing stock,[2] they represent a disproportionately

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[1] Not wishing to engage in overkill, it can nonetheless be said that being a property owner in California these days isn't the proverbial bowl of cherries. Even after this Court twice chastised the California judiciary in 1987 for its failure to understand the protection required by the Just Compensation Clause (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 U.S. 304, 311; *Nollan v. California Coastal Commn.* [1987] 483 U.S. 825, 839), California courts continue to ignore the teachings of this Court and U.S. Courts of Appeals on Fifth Amendment issues, as graphically demonstrated by the conflicting decisions of the California courts and the Ninth Circuit Court of Appeals on the issue at bench.

[2] *See, e.g.*, California Dept. of Housing & Community Dev., *Mobile Home Parks in California — A Survey of Mobile Home Park Owners Pursuant to S.B. 1835* (1986) at 1.

large amount of the state's rent control litigation, as the recent conflicting decisions of the California appellate courts and the Ninth Circuit Court of Appeals attest. Part of the reason for that is the directly transferred property interest which only mobile home rent control ordinances impose on property owners. Resolution of the invalidity of that practice would eliminate much litigation.

SUMMARY OF ARGUMENT

In this direct conflict of decisions, which places the Third and Ninth Circuit U.S. Courts of Appeals on one side[3] and the California state courts on the other,[4] there is one thing on which all courts seem agreed: the combined effect of the type of mobile home rent control regulations now before this Court create a direct transfer of property and redistribution of wealth from the owners of mobile home parks to their tenants.

In holding that such regulations *could* violate the Fifth Amendment, the Third Circuit concluded:

> ". . . the effect of the law is to transfer the interest, without compensation, from the landlords to the tenants. . . . [The landlords] receive nothing at all

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[3] *Pinewood Estates of Michigan v. Barnegat Township Leveling Bd.* (3d Cir. 1990) 898 F.2d 347; *Hall v. City of Santa Barbara* (9th Cir. 1986) 833 F.2d 1270; *Azul Pacifico, Inc. v. City of Los Angeles* (9th Cir. 1991) __ F.2d __.

[4] *Yee v. City of Escondido* (1988) 224 Cal.App.3d 1349, 274 Cal.Rptr. 551, *cert. granted* [the case at bench]; *Casella v. City of Morgan Hill* (1991) 230 Cal.App.3d 43, 280 Cal.Rprt. 876; *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside* (1984) 157 Cal.App.3d 887, 204 Cal.Rptr. 239.

> for the taking of the alienable physical property interest vested in their tenants." (*Pinewood*, 898 F.2d at 353)

Almost simultaneously, while reaching the opposite legal conclusion and holding that such regulations *do not* offend the Fifth Amendment, the California Court of Appeal said in the case at bench:

> "No one can dispute that Escondido's rent control ordinance, like the ordinance in *Oceanside*, effects a transfer of value from landlords to tenants." (*Yee*, 224 Cal.App.3d at 1354)

The difference in approach is that the federal appellate courts have held that this redistribution of property transgresses the protection of the Fifth Amendment, while the California appellate courts have essentially said, "So what?"

The answer to that implicit question is the Fifth Amendment's Just Compensation Clause. Although this Court has permitted property and wealth redistribution schemes in the past, it has never done so unless the party whose property was being taken was compensated. Indeed, the presence of compensation has been the key to upholding such schemes. (*Hawaii Housing Authority v. Midkiff* [1984] 467 U.S. 229; *Berman v. Parker* [1954] 348 U.S. 26) As this Court put it in *Berman*, when explaining why it was permitting a forced transfer of property from one citizen to another through the government's coercive eminent domain power:

> "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." (348 U.S. at 36)

In contrast to the teaching of *Berman* and *Hawaii Housing Authority*, what the City of Escondido has done in the guise of regulating mobile home parks is to:

- limit the rent which the landlord can charge (the "rent control" part of the ordinance);
- maintain that controlled rent level when old tenants leave and new ones arrive (a restriction known as "vacancy control"); and
- grant to the departing tenants the right to choose their replacements as tenants.

As a consequence of these multi-layered controls, the old mobile home (owned by the tenant) commands a substantial bonus price in the market (regardless of condition). That bonus is demonstrable and measurable in every mobile home market. For example, in a case that went to trial (in contrast to the case at bench, which was decided on pleadings alone), the following occurred:

> "One Mrs. Morrison . . . testified that she bought a coach in Azul Pacifico's park for $77,000 and immediately sold it for $5000 and had it removed from the pad. When asked why, she responded: 'The use of the land was what I paid for more than the place.' " (*Azul Pacifico*, __ F.2d at __)

That last thought bears repetition: "The use of the land was what I paid for . . ." Ordinarily, one would expect payment for "the use of the land" to be made to the owner of the land. However, under rent/vacancy

control the payment for "the use of the land" was made to the former tenant, not the owner of the land. Absent rent/vacancy controls like Escondido's, all the tenant had to sell was a mobile home coach which the buyer thought was worth almost nothing. Yet the price it commanded was substantial. The $72,000 difference[5] was the combined effect of rent control and vacancy control in the mobile home park context.

The combination of these elements is the key. Unless all are present, the Fifth Amendment problem that brought the Yees and their friends to court does not arise. That is what distinguishes this kind of mobile home rent/vacancy control from more routine rent control ordinances affecting apartments. The departing tenant owns a tangible, salable asset (the right to live in a rent controlled space) and a tangible, salable item on which to hang a price tag (the mobile home). Giving tenants the right to sell their occupancy in a controlled mobile home park transfers ownership and receipt of that price from the landlord to the tenant.

Absent this stringent combination of controls, the new tenant would pay the same overall price. He or she would simply pay it all to the landlord in rent, rather than paying part to the landlord and part to the departing tenant disguised as the purchase price for the mobile home.

The City, its allies, and the California courts focus on what they view as the needs and problems of mobile home park tenants. Neither the members of the California Mobilehome Parkowners Alliance nor, we suspect,

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5 Please note that this $72,000 represents the windfall to a tenant on only one space in a large mobile home park. Multiplied by the entire park, the value of the property taken from the landlord is substantial.

Mr. and Mrs. Yee and their neighbors, are unsympathetic to the problems of their tenants. The members represented by this *Amicus*, for example, are not large, faceless, corporate bureaucracies out of touch with the real world. Most of these parks are small "mom and pop" operations.

The problem arises when simplistic solutions are chosen for complex problems; when, in haste, one-sided "cures" are devised. That aspect of the problem is accentuated in this case because the ordinance at issue was enacted by a citizen initiative, rather than City Council action. The mobile home park tenants of Escondido voted themselves a jackpot bonus. The means chosen by those tenants are now before this Court.

To meet their perceived needs, the mobile home tenants of Escondido have cast their net too broadly. They have transferred palpable interests in property from their landlords to themselves. Without compensation. That, the constitution forbids.

FACTUAL SUMMARY

The operative facts can be succinctly stated, as this case was decided below on the pleadings.

Mobile home park owners own the land on which the park is located and on which mobile home coaches are placed. The mobile home coaches themselves are owned by their occupants. Thus, while they are referred to as "tenants," they are tenants only with respect to the land. The tenants own their mobile homes. The "mobile" homes are mobile in little more than historic nomenclature. These are not the historic "trailers" that can be hooked on the back of the family station wagon and

driven off. These are substantial structures which need special (though not expensive) handling to move.

Escondido's mobile home rent control ordinance was enacted by citizen initiative. The voters of Escondido (of which far more are tenants than landlords) enacted these regulations for themselves.

The combined effect of state statutes and city ordinances on mobile home park owners in Escondido is that:

- the rental rate is controlled by the city (Escondido Munic. Code, Art. V., §29-103);
- the rental rate remains unchanged when an old tenant departs and a new one takes his or her place (Escondido Munic. Code, Art. V., §29-103);
- the departing tenant has the absolute right to decide who will buy his mobile home and be the new tenant (Cal. Civ. Code §798.74);
- when a tenant sells his mobile home and vacates the premises, the park owner must rent the pad to the mobile home purchaser (Cal. Civ. Code §798.74);
- the park owner must renew pad rental agreements (Cal. Civ. Code §§798.55, 798.56);
- the park owner may not terminate rental agreements except for sharply limited reasons (Cal. Civ. Code §§798.55, 798.56).

The upshot of this system, as the California Court of Appeal noted in this case, is that an interest in the real property is actually transferred — without compensation — from the property owner to the tenants. That interest is definable and marketable. It has measurable value. That value is captured by the tenant when he or she sells the mobile home (with its rent controlled location) to a successor.

Thus, the combined effect of these state and local restrictions is that two things have happened to the total amount which a landlord would be able to charge as rent in an uncontrolled world: (1) the amount of rent has an arbitrary upper limit placed on it; and (2) the departing tenant collects part of the remaining amount as a monumental windfall for selling his or her coach in the rent controlled park. This windfall payment to the tenants who happen to occupy mobile home parks at the time a rent/vacancy control ordinance is enacted, is unrelated to any interest which legitimately belongs to the tenant. It is related solely to the location of the parcel in a rent controlled park. But the value of the location belongs to the land owner, not the tenant. The size of this windfall is usually substantial, running to the tens of thousands of dollars per space. The illustration noted above, in which a tenant pocketed $72,000 as her windfall payment, is an exemplar of the scope of the property transfers effected by rent/vacancy control ordinances. As a generality, the trial court in *Azul Pacifico* found that the size of the windfall at that park averaged $20,000 per space. (*Azul Pacifico*, __ F.2d at __)

ARGUMENT

"THE POLITICAL ETHICS REFLECTED IN THE FIFTH AMENDMENT REJECT CONFISCATION AS A MEASURE OF JUSTICE." [6]

It is hard to improve on this Court's vintage words.[7] However, what the California courts have approved is the precise opposite of this Court's simple and fair summary of the Just Compensation Clause's mandate.

A
A Complete Takeover of Property Would Unarguably be a Taking

Perhaps, by contrast, a hypothetical can illustrate the reality facing owners of mobile home parks in California today.

Suppose that the City of Escondido decided that mobile home parks housed the city's poorest citizens and, to protect them from joining the ranks of the homeless, the city decided to acquire all mobile home parks to maintain as low income housing. To accomplish that, the city assembled the owners of Escondido's mobile home parks and informed them that the city was taking over the parks. A sort of *coup de park*. In exchange for

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6 *U.S. v. Cors* (1949) 337 U.S. 325, 332.

7 Professor Michelman's expansion on that thought is worth noting: "any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." (Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* [1967] 80 Harv. L. Rev. 1165, 1181)

title to their properties, the owners would receive contracts to manage the new city-owned parks and would be paid a salary based on a percentage of the rent collected. But the city would set the rent; the rental rates would change only when the city decided they could; funds for upkeep, insurance, and maintenance would have to come from the rents collected or money borrowed by the "managers," as the city would invest no money of its own; and the tenants could either remain in perpetuity or designate their successors in interest.

Had the City of Escondido actually commandeered title to the properties and placed it in the City's name, there is no doubt that a Fifth Amendment violation would have occurred. Property would have been taken for public use without any compensation changing hands. The acquisition of title would have made the taking obvious.

As this Court recently explained:

> ". . . government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' [Citation.]" (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 U.S. 304, 315; emphasis added)

When legislation is enacted which takes property with no intent to provide compensation, the legislation is invalid. (*Hodel v. Irving* [1987] 481 U.S. 704)[8]

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8 The statute in *Irving* was intended to solve a problem caused by intestate succession to miniscule Indian estates. In the process, however, the recognized property right of devise and descent was taken from current owners without any intent to pay for that taking. As a result, this Court struck down the statute.

How does the actual hijacking of title from the park owners in the hypothetical differ from what the Escondido ordinance actually did to these park owners? In only one meaningful way: In the hypothetical, the owners would be relieved of the dubious honor of paying taxes on the property, as they would no longer hold title to it. As the New York Court of Appeals put it in its classic exposition on the difference between overt and covert confiscation:

> "The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden." (*Arverne Bay Constr. Co. v. Thatcher* [N.Y. 1938] 15 N.E.2d 587, 592)[9]

Aside from the taxation issue, the Escondido ordinance has stripped mobile home park owners of all useful indicia of ownership as effectively as if refugee Party apparatchiks from eastern Europe had taken over the town and "socialized" it. Hyperbolic as this may sound, it is the reality. Rent/vacancy control has reduced the ownership of a mobile home park in Escondido to something akin to a public utility, where all decisions are made by the government and the titular owners of the properties have lost not only control over what they can charge and who they can rent to, but have

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9 Similarly, an older California case characterized the impact of overly stringent regulation as leaving the property owners "nothing . . . but bare ownership and the burden of taxation." (*Hoshour v. County of Contra Costa* [1962] 203 Cal.App.2d 602, 603, 21 Cal.Rptr. 714)

been compelled to transfer substantial financial interests to their tenants with no compensation whatever.

B
A Compelled Transfer of a Recognizable Interest in Property is a Taking

As noted earlier, this Court approved Hawaii's plan for land reform and its use of the power of eminent domain to accomplish the breakdown of a feudal land tenure system (*Hawaii Housing Authority v. Midkiff*), and also approved the concept of urban redevelopment and its use of the power of eminent domain to assemble large tracts of land for resale to developers who would redevelop decayed city cores (*Berman v. Parker*).

In neither case, however, was there any doubt that compensation was a key element in the package. Indeed, the entire discussion in *Hawaii Housing Authority* was directed at the "public use" issue because, as the unanimous opinion put it, "we assume for purposes of these appeals that the weighty demand of just compensation has been met . . . ." (467 U.S. at 245) Absent this Court's ability to make that crucial assumption, the land title reform system which compelled the transfer of fee simple title from landlords to tenants could not have passed constitutional muster.

Nor is this surprising. The extent of the power of eminent domain has been described in terms more suited to breathless ingenues than judges :

> "The power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land."

(*Winger v. Aires* (Pa. 1952) 89 A.2d 521, 522)

When recognized property interests are compulsorily transferred from a private citizen on orders from the government, compensation is mandated:

> "This Court has stated that a sovereign 'by ipse dixit, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.' " (*Ruckelshaus v. Monsanto Co.* [1984] 467 U.S. 986, 1012; quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith* [1980] 449 U.S. 155, 161.)

In the context at bench, there is no issue that such a transfer has taken place. Wordplay alone stands between these mobile home park owners and the property right which has been taken from them and given to their tenants. All of the courts to examine the mobile home rent/vacancy control ordinances involved here agree that property interests have been transferred. Given that judicial agreement about the actual transfer of interests from landlords to tenants, it is sophistry to deny that a taking has occurred and monstrous to deny the protection of those portions of the constitution designed to shield individuals from the hand of government when it overreaches.

C
A Taking Occurs When Government Commands a Property Owner to Stand Aside and Permit Permanent Physical Occupation of Property by Another

The Escondido scheme goes beyond mere wealth transfer. It commands property owners to permit permanent physical occupation of their property by strangers.

Physical invasion has always been viewed by this Court as a particularly obnoxious form of governmental intrusion, one which can more readily be seen as a Fifth Amendment violation. (*Penn Central Transp. Co. v. City of New York* [1978] 438 U.S. 104, 122; *Loretto v. Teleprompter Manhattan CATV Corp.* [1982] 458 U.S. 419, 436)

"Property" consists of many things. Indeed, the concept is so complex that this Court has repeatedly used the bundle of sticks analogy to help illustrate it, concluding that either the taking of an entire "stick" from the "bundle" or the taking of a part of all "sticks" in the "bundle" violates the Taking Clause of the Fifth Amendment.[10]

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[10] *E.g., Kaiser Aetna v. U.S.* (1979) 444 U.S. 164, 176; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 433, 435; *U.S. v. Security Indus. Bank* (1982) 459 U.S. 70, 76; *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 1011; *Hodel v. Irving* (1987) 481 U.S. 704, 716; *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825, 831.

The "sticks" obviously affected here are the right to exclude others from one's property, the right to possession of one's property and, because of the wealth transfer aspects of the ordinances, the right to alienate one's property.

One "stick" which has received special protection from this Court has been the right of the property owner to exclude others from his property. This Court has repeatedly referred to the right to exclude others as ". . . one of the most essential . . ."[11] and ". . . most treasured strands in an owner's bundle of property rights."[12]

Moreover, the Court has been particularly protective against governmental actions which permit strangers to invade the property of others:

> "This is *not* a case in which the Government is exercising its regulatory power in a manner that will cause an *insubstantial devaluation* of petitioners' private property; rather, the imposition of the navigable servitude in this context will result in *an actual physical invasion* of the privately owned marina." (*Kaiser Aetna*, 444 U.S. at 180; emphasis added; *see also Loretto*, 458 U.S. at 436)

Like *Kaiser Aetna*, this case does not involve "insubstantial devaluation" of property. The actual physical transfer of interests effected by the rent/vacancy control ordinance causes injury to the park owners which is measured in tens of thousands of dollars *per space*.

This Court later explained its rule as affording protection to a property owner against "an interloper with a

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11 *Kaiser Aetna*, 444 U.S. at 176; *Loretto*, 458 U.S. at 433; *Ruckelshaus*, 467 U.S. at 1011; *Irving*, 481 U.S. at 716; *Nollan*, 486 U.S. at 831.

12 *Loretto*, 458 U.S. at 435.

government license." (*FCC v. Florida Power Corp.* [1987] 480 U.S. 245, 253)[13] That analogy seems apt here, where the Escondido ordinance permits — or, more properly, requires — an unending stream of strangers to occupy the mobile home parks.

Coerced acceptance of physical invasion is enough — by itself — under this Court's precedents to find a taking. In fact, however, the Escondido intrusion may be qualitatively worse than the others already condemned by this Court. For here we are not talking about boats on a waterway (*Kaiser Aetna*) or strollers on a beach (*Nollan*) or wires in a building (*Loretto*). Here, we are talking about living quarters. The landlords have lost all ability to determine who will live in their parks. That control has shifted to tenants who no longer have any particular interest in who will live in the parks, because it is a power exercised only when they are departing.

THE KIND OF MOBILE HOME RENT CONTROL ORDINANCES BEFORE THIS COURT FAIL TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST

Much of the history of litigation involving the Bill of Rights has been over the way that governmentally chosen means fit with the governmentally sought ends. This Court has long been concerned that, to be valid, it is necessary for municipal land use regulations to substantially advance legitimate state interests. The reason

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13 Or, as Professor Tribe colorfully expressed it, ". . . government-invited gatecrashers . . ." (Tribe, *American Constitutional Law* [2d ed 1988] §9-5 at 602)

has been to ensure that such regulations comport with the fundamental protections of the Fifth Amendment rights of those being regulated. These concerns began at least as early as this Court's 1928 decision in *Nectow v. City of Cambridge* (1928) 277 U.S. 183, 187-188 and have continued through the 1962 decision in *Goldblatt v. Hempstead* (1962) 369 U.S. 590, and the 1978 decision in *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 127 to the 1987 decision in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 834 fn 3, 841.

Nollan also emphasized that, particularly "where the actual conveyance of property" is involved (483 U.S. at 841) a more precise quantum of scrutiny of the government's rationale is required than the traditional "rational basis" rubric would afford (483 U.S. at 834, fn 3).

Here, the California Court of Appeal put the issue starkly. It acknowledged that the Escondido ordinance "... effects a transfer of value from landlords to tenants." (*Yee*, 224 Cal.App.3d at 1354) However, it concluded that, because the ordinance could be justified by a rational purpose, and Mr. and Mrs. Yee's taking claim was based solely on that forced transfer,[14] there was no unconstitutional "taking" of what was plainly "taken" from them. (*Yee*, 224 Cal.App.3d at 1354)

The question addressed in this section is whether this stringent combination of Escondido requirements is

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[14] One should be able to presume — at least in the present procedural posture of a case dismissed on the pleadings — that Mr. and Mrs. Yee pursued a narrow issue because the law on that issue was clear: when property is transferred, there must be compensation. That being the case, there was no need for the Yees to jump through the numerous procedural hoops placed in the path of those who seek compensation for other types of regulatory takings.

rationally needed to advance any legitimate state interest?[15] Examination of the way that rent/vacancy control operates at mobile home parks will demonstrate that there is no need for such radical measures to accomplish any legitimate state goals.

A
Rent/Vacancy Control Harms the Park Owner and Does Not Protect the Incoming Tenant

The park operator owns the land. He generally provides pads and connections for gas, electricity, and water. The tenant purchases his own mobile home, either new or, more often, from a departing tenant. When rents are controlled (*i.e.*, artificially restrained by the government at less than their market level would otherwise be) and there is *no* vacancy control, then the property owner has the ability, when the tenants move, to raise the rent of individual spaces to their market level from the artificially low controlled level. Future increases are then controlled.

But when you add vacancy control to a mobile home park, the departing tenant obtains a windfall: he gets not merely the market value of his personal property, *i.e.*, the mobile home (to which he is entitled), but also a very large premium (tens of thousands of dollars for each space) above that value which represents the value of the location of his mobile home in a rent-controlled park with the controlled, below market, rent already set. (*Pinewood*, 898 F.2d at 353; *Azul Pacifico*, __ F.2d at __)

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[15] This issue is separate from the physical invasion issue. A holding that the physical invasion, by itself, violates the Just Compensation Clause, as this *Amicus* believes it does, obviates the need for this kind of ends and means analysis.

That result does not comport with the *Nectow / Goldblatt / Penn Central / Nollan* requirement that the governmental action substantially advance a legitimate state interest. Certainly not in the extreme form present in the Escondido initiative ordinance.

The general purpose of vacancy control is said to be to protect the incoming tenant from exorbitant rent increases. In an apartment building, where the old tenant is not selling the apartment unit to the incoming tenant, vacancy control can serve its purpose. The new tenant's cost is the controlled rental rate.

Under regimes like Escondido's, however, the new tenant receives no protection. While the rent may be limited by the control ordinance, nothing restricts the price which the departing tenant can demand for the old mobile home which sits on the rent controlled pad. (*Pinewood*, 898 F.2d at 353)[16] As the Ninth Circuit Court of Appeals analyzed it:

> "[V]acancy control does not help incoming tenants in the case of mobile homes. The coach buyer will pay the same effective rent for the pad whether or not the landlord is permitted to raise the rent at vacancy. To the potential buyer, the total product — housing — is the relevant cost; how that cost is allocated between rent for the pad and mortgage payments on the coach is largely irrelevant. For example, a buyer who can afford to spend $1000 each month on housing is indifferent between a coach with a $500 mortgage payment on a $500 pad and one with an $800 payment on a $200 pad." (*Azul Pacifico*, __ F.2d at __)[17]

Thus, assuming that the protection of *incoming* tenants from increased occupancy costs is a legitimate state interest, the Escondido ordinance does not substantially advance that interest. Indeed, it causes that interest actual harm.

B

Rent/Vacancy Control is Not Needed to Protect the Departing Tenant

The only other interest which such an ordinance might be said to serve is the protection of *departing* tenants' ability to obtain the fair market value of their mobile home coaches on sale to new tenants. Without vacancy control, it has been suggested that it would be possible for the landlord to raise the rent for the incoming tenant not merely to the "market" value of an empty pad, but to a level above that value sufficient to deter the incoming tenant either from purchasing the old coach from the departing tenant or from purchasing it at its full, Blue Book value.

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16 In *Pinewood*, the Third Circuit Court of Appeals commented on the irony in restricting only the rent but not the price of the coaches. (898 F.2d at 353 fn 9)

17 Please note that the ordinance at bench is substantially more restrictive than the Los Angeles ordinance which was struck down in *Azul Pacifico*. When pad tenancy changed hands, the *Azul Pacifico* property owners *were permitted to increase the rent either by 10% or to the highest rent charged for a comparable pad.* (__ F.2d at __) Here, in stark contrast, NO rent increase could be made without city permission.

There is an argument that this asserted concern for the departing tenant ignores the fact that there is an inflated element in what some see as the "value" of the coach which, in reality, originated as the uncompensated taking from the landlord of an interest in the location of the coach. If that is true, as this *Amicus* believes the evidence would show were this case permitted to go to trial, then the departing tenant is in no need of protection, as his only threatened "loss" in value was not legitimately his to begin with.

Assuming, *arguendo*, that there is a legitimate state interest in protecting the departing tenant, the solution devised by Escondido fails to pass constitutional muster because it goes far beyond what is necessary.

Let's return, for a moment, to the Ninth Circuit's example of a tenant with $1000 per month to spend on housing. If the Blue Book value of the coach is the capitalized value of $400 per month, but the landlord raises the pad rental to $700 per month, then the new tenant has only $300 per month to pay for the coach.[18]

So, assuming that *some* protection for departing tenants would be justified, the question before this Court is whether the Escondido solution complies with this Court's standards of constitutionality. In *Goldblatt* and *Penn Central* this Court said that "a use restriction on real property may constitute a 'taking' if *not reasonably necessary* to the effectuation of a substantial public purpose . . . ." (*Penn Central*, 438 U.S. at 127; emphasis

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[18] In reality, this is an unlikely event. The cost of moving a mobile home is measured in the low hundreds of dollars. (*See* California Dept. of Housing & Community Dev., *Mobilehome Parks in California: A Survey of Park Operators and Tenants* at 49.) Thus, if the park owner raised the pad rental too high, the tenant could, at minimal cost, simply move to another location.

added). Therefore, careful examination of the Escondido ordinance is needed to determine whether this ordinance is "reasonably necessary" for the job. Put another way, the question is whether the city could accomplish legitimate goals in a manner which is less intrusive on the rights of the park owners.

The Escondido ordinance uses a cannon where a fly swatter would do. Rather than confiscating property interests from landlords and providing windfalls for those tenants fortunate enough to be living in the mobile home parks when the initiative measure was passed, there are manifold ways to protect the departing tenants.

For example, the Los Angeles method of modified vacancy control discussed in *Azul Pacifico* might be used. In Los Angeles, the landlords are permitted to increase rents when tenancy changes by the lesser of 10% or the price at which vacant pads are rented in the park.

Or administrative redress could be provided. All rent control ordinances (Escondido's included) establish an administrative system for the processing of requests for rent increases. That system could also hear complaints from new tenants who believe they are being overcharged.

Undoubtedly other potential solutions, each far less intrusive on the rights of the mobile home park owners but equally effective at protecting the rights of departing tenants (other than their windfall profit "rights") could be devised.[19] The point here is that the Escondido

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[19] Thus, assuming, *arguendo*, that Escondido had a valid goal in mind when it enacted the scheme at bench, neither that validity nor the city's reasonableness or good intentions would save the ordinance if it authorizes the taking of private property for public use without compensation. As this Court held in *First English*, the Fifth

(continued)

ordinance casts its net too broadly. In the guise of resolving a relatively minor problem, it has made a fundamental change in the ownership of mobile home parks, forcefully transferring an interest in the landlords' property to their tenants. That property transfer is not needed to protect the legitimate interests of departing tenants. If Escondido believes that the idea is otherwise worthwhile then, as this Court put it in *Nollan*, ". . . it must pay for it." (483 U.S. at 842)

HOW FAR IS "TOO FAR"?

Whether one views this mobile home rent control/vacancy control situation as a physical occupation (as the Third and Ninth Circuit Courts of Appeals have done) or as a regulatory matter (as the California appellate courts have done), there is a minimum threshold beyond which this Court has not permitted government to go. From 1922's *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415, through 1987's *First English*, 482 U.S. at 316, this Court has held consistently that the focal point in takings litigation is to determine how far the government action goes, because if it goes "too far," it is a taking which requires compensation.

This Court has also consistently refused to develop any precise template or formula for determining the location of that line, opting instead for "ad hoc factual" inquiries in each case. (*E.g., Penn Central Transp. Co. v. City of New York* [1978] 438 US 104, 124; *Kaiser*

(fn. continued)
Amendment requires ". . . compensation in the event of *otherwise proper interference* amounting to a taking." (482 U.S. at 315; emphasis added; Court's emphasis omitted.)

Aetna v. U.S. [1979] 444 US 164, 175; *Ruckelshaus v. Monsanto Co.* [1984] 467 US 986, 1005.)

Thus, to try to locate the line separating "ok" from "too far," a brief examination of some of this Court's decisions on both sides of the line may be of service.

In *Penn Central*, the New York landmarks protection ordinance required maintenance of Grand Central Terminal and precluded some development. However, it did not interfere with the way the owners of the property had traditionally used it, did not preclude future additional development, did not prevent the owners from making a profit on their investment, and offered "transferrable development rights" as compensation.

Penn Central goes on the "ok" side of the line. Thus, if mobile home rent/vacancy controls permitted the park owners to continue to manage as they had in the past, and offered some form of compensation in exchange for any property taken, such an ordinance would not be a taking.

In *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, the Pennsylvania anti-subsidence statute required coal mine operators to leave enough coal in the ground to support the surface of the land. It therefore reduced the amount of coal which could be extracted from the mines. However, in the overall context of the coal mining business, the amount of coal required to be left in the ground was minimal (some had to be left anyway simply to support the tunnels), the mine owners retained control over the use of their facilities, and the regulations did not interfere with the profitability of the mines.

Keystone also goes on the "ok" side of the line. Thus, if mobile home rent/vacancy controls had only a *de*

minimis economic impact and left control over the parks in the hands of the owners, there would be no taking.

Pennell v. City of San Jose (1988) 485 U.S. 1 involved an apartment rent control ordinance. Declining to reach an intriguing issue about using the tenant's ability to pay as a factor in setting rental rates (because it had not yet been applied), the ordinance was upheld against a general facial attack because, while the ordinance regulated the way the landlords could do business, it did not physically interfere with them or deprive them of the ability to control the use of their property.

Pennell is on the "ok" side of the line. Thus, if mobile home rent/vacancy controls do not physically interfere with, or deprive the park owners of the ability to control the use of their property, there would be no taking.

In *Irving*, the Congressional enactment was designed to eliminate a massive bookkeeping problem for the Bureau of Indian Affairs. Intestate transfer of interests in Indian estates had evidently so divided the interests in thousands of properties that the interests were virtually worthless. They were certainly worth less than the administrative cost of keeping track of them. So Congress decreed that such miniscule estates could not pass by intestacy. Upon a death intestate, the decedent's interest would escheat to his or her tribe. However, although the interference appeared almost nonexistent, this Court held that it destroyed the recognized "stick" in the property rights bundle of the dying Indian called the right to devise property — even if only by operation of law. The statute was struck down because of the coerced and uncompensated taking of that property interest.

The statute in *Irving* went "too far." Thus, if mobile home rent/vacancy controls remove a recognizable stick from the property rights bundle, there would be a taking.

In *Kaiser Aetna*, the Corps of Engineers had already granted a permit to private parties to develop a marina. They did so. After the fact, the Corps decided to require public access to the marina, thus interfering with the owners' exclusive possession and granting an easement to the public to use the property. This Court held that such action would be a taking.

Kaiser Aetna is on the "too far" side of the line. Thus, if mobile home rent/vacancy controls interfere with the park owners' right to exclusive possession and grant an interest in the property to others, there would be a taking.

Loretto involved cable TV access to apartment buildings. A New York statute purported to require landlords to permit cable companies to install cables. Notwithstanding the miniscule nature of the invasion,[20] this Court concluded that *all* permanent physical occupations are takings *per se*. This forced transfer of an interest in the property could not be squared with the Fifth Amendment.

Loretto is on the "too far" side of the line. Thus, if mobile home rent/vacancy controls permit permanent physical occupation by third parties, there would be a taking.

Nollan involved a California Coastal Commission condition to a building permit, requiring the dedication of an easement along the sandy beach 1/3 of the property. The condition would have opened the property to continuous physical invasion by unknown numbers of unknown members of the general public. This Court struck down the condition.

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20 This Court characterized the space occupied as "no bigger than a breadbox." (458 U.S. at 438, fn 16)

Nollan, follows *Lorretto* and is on the "too far" side of the line.

Attempting to locate a "takings line" by graphing those points yields some guidance and insight.

First. If the government action merely regulates the way business can be conducted, without transferring interests to others, without invading the premises, and without interfering with profits, then no taking occurs.

Second. If the property owner remains in substantial control of his or her property, then there is no taking.

Third. If there is physical invasion of the property, there is a taking.

Fourth. If there is the transfer of an interest in property, there is a taking.

Attempting to place the case at bench on this graph seems relatively easy. Because of the conceded transfer of property interests from the property owners to their tenants, the dispossession of the property owners, and the subjection of their property to continuous occupation by strangers who have bought their right of occupancy from other strangers, the facts of this case are on the "too far" side of the line. In fact, this case is quite far over the line. At this point, it bears reiterating that:

- all courts agree that a definite, cognizable, and marketable interest in property was transferred; and
- no compensation was paid to the landowners for this coerced property transfer.

Under this Court's clear precedents, that cannot happen. If a non-governmental entity attempted any such action, it would immediately be condemned as piracy. It is no less so when done with the imprimatur of government.

This initiative measure was a high-handed land grab. Nothing more. It merits this Court's constitutional censure.

CONCLUSION

And so we return to basics:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." (*Loan Assn. v. Topeka* [1875] 87 U.S. [20 Wall.] 655, 662)

The Fifth Amendment's Just Compensation Clause was designed to stand as a bulwark against tyrannical majorities. Mobile home park owners are in need of that protection today. Here, the citizens of Escondido (far more of whom are tenants than landlords) proposed and adopted an initiative measure by which they voted themselves a windfall bonus at the expense of mobile home park owners. Property interests were concededly transferred when the final votes were counted.

At bottom, the core of the Fifth Amendment is its insistence on fairness. Mobile home park owners have not been the recipients of fair treatment by the California

courts. It is time for this Court to send an unmistakable message that the Fifth Amendment means what it says and that it applies even in California.

Dated: November 25, 1991.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE YEE, et al.,
Petitioners,

vs.

CITY OF ESCONDIDO, a municipal corporation,
Respondent.

On Certiorari to the
California Court of Appeal
Fourth Appellate District, Division One

BRIEF OF MANUFACTURED HOUSING EDUCATIONAL TRUSTS OF LOS ANGELES COUNTY AND ORANGE COUNTY, CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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BRIEF OF MANUFACTURED HOUSING EDUCATIONAL TRUSTS OF LOS ANGELES COUNTY AND ORANGE COUNTY, CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

This brief is submitted with the written consent of all parties filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The Manufactured Housing Educational Trusts of Los Angeles County and Orange County, California are non-profit trade associations whose individual and organizational members include owners and operators of more

than 500 mobilehome parks in Southern California. Local regulations and exactions are matters of great interest to members who develop, operate and serve mobilehome communities that house tens of thousands of Southern California residents, including many senior citizens and young families.

Amici believe that ordinances like Escondido's, which appropriate possessory interests in property and enrich current residents at the expense of their successors, as well as investors in mobilehome communities, deter development of affordable housing, increase its cost and limit the availability of affordable housing.

Amici believe that their experience and perspective can assist the Court in understanding the economic effects and legal consequences of the Escondido Ordinance, which resembles many others either presently in effect or contemplated in California and other states.

Amici respectfully request that the Court reverse the decision of the California Court of Appeal and instruct the lower court to remand the consolidated cases for trial.

STATEMENT OF THE CASE

"Mobilehome" is a misnomer. Today's mobilehomes are not trailers. They are manufactured homes, built in sections, towed into place on a prepared space or "pad," assembled, connected to utilities and then fitted with awnings, porches and the like. Their size and comforts compare favorably with postwar tract homes. Mobilehome communities have long appealed to senior citizens and, as prices for conventional homes have risen, mobilehomes have become increasingly popular "starter" homes for young families.

Typically, mobilehome residents own their homes and rent the space from the owner of the mobilehome park who provides private streets, recreational facilities, common areas and amenities.

California regulates mobilehome tenancies through a Mobilehome Residency Law. Cal. Civ. Code § 798 *et seq.* (West 1991). Owners may not terminate tenancies without cause, require removal of mobilehomes when tenancies end, or disapprove incoming residents, so long as they are creditworthy, and likely to abide by park rules. Cal. Civ. Code §§ 798.55, 798.73, 798.74 (West 1991). As a consequence, mobilehomes are usually sold in place when a resident wants to move. Residents sell their homes to new residents, subject only to the owner's approval of credit and references.

In recent years, persistent inflation has brought rent control to many California communities. Escondido's ordinance (the "Escondido Ordinance"), enacted by the voters in 1988, reduced mobilehome space rents to 1986 levels. Property owners may apply to the City Council, sitting as a Mobilehome Park Rental Review Board, for rent increases in order to pay for capital improvements and certain cost increases. All other increases are misdemeanors.

The Escondido Ordinance, operating in conjunction with the Mobilehome Residency Law, assures residents permanent tenure and bargain rent, so long as they pay the rent and observe park rules. Incoming residents enjoy the same rights, so mobilehomes change hands at huge premiums — often tens of thousands of dollars more than comparable homes in dealer inventories or unregulated mobilehome parks. *Amici* believe that these premiums represent the value of a statutory leasehold — a permanent, transferable, possessory interest in the owner's

property — created by operation of law and given to the tenants without just compensation, in violation of the Fifth Amendment.

Three panels of two Circuit Courts of Appeals have agreed. *Hall v. Santa Barbara,* 833 F.2d 1270 (9th Cir. 1987), *cert. denied,* 485 U.S. 940 (1988); *Pinewood Estates v. Barnegat Township Leveling Bd.,* 898 F.2d 347 (3d Cir. 1990); *Azul Pacifico Inc. v. City of Los Angeles,* ___ F.2d ___, Nos. 90-55853, 90-56066, slip op. 15213 (9th Cir. Nov. 1, 1991). On similar grounds, New York's highest court overturned a New York City statute that compelled owners of one-room apartments to rehabilitate and rent their properties. *Seawall Assocs. v. City of New York,* 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989).

California courts disregarded these authorities and dismissed Petitioners' complaints. As in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987), and *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), this Court's decision is needed to assure that California law conforms to the Fifth Amendment.[1]

SUMMARY OF ARGUMENT

Under the Fifth Amendment, private property cannot be taken without just compensation. Constitutional protection extends to all forms of property: real, personal, tangible and intangible. For constitutional purposes, "property" means rights to possess, use and dispose of land, buildings or other things, rather than the things

[1]In *Nollan,* this Court noted that its "conclusion . . . [was] consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." 483 U.S. at 839.

themselves. This Court has long recognized that such varied interests as air rights, leaseholds, liens, easements, rights of inheritance and other partial, contingent or intangible interests in property cannot be taken without just compensation. Government action takes private property if it effects a physical occupation or invasion; does not substantially advance a legitimate governmental purpose; or if the character, economic impact, and interference with distinct, investment-backed expectations are so severe that the burden should properly fall upon the public, rather than a few persons.

Often, "taking" claims are classified as "physical" or "regulatory." Whatever label applies, the labels are variations upon the same theme, for constitutional analysis requires an examination of the effects upon constitutionally-protected rights to possess, use and dispose of property. "Physical" takings include a wide variety of interference with constitutionally-protected rights, including seizures and invasions of property, appropriations of subsidiary rights, imposition of easements, destruction of particular expectancies or rights, and other measures that dispossess owners or impair their rights.

Under the Escondido Ordinance, as it is alleged to operate, valuable rights in the realty are transferred to mobilehome park residents, who may occupy the owner's land permanently at reduced rent, and sell that right to others. In effect, residents receive a bargain leasehold, created by the Ordinance, as it operates in conjunction with California's Mobilehome Residency Law. Cal. Civ. Code §§ 798 *et seq.* (West 1991). Residents sell these property rights to their successors, along with their used mobilehomes, when they decide to move. New residents are willing to pay large premiums in order to enjoy the rights transferred by the Ordinance. As a consequence,

used mobilehomes change hands at prices that far exceed the value of the used mobilehome coach, because the nominal price includes rights in the underlying land appropriated by the Ordinance.

In *Hall* and *Pinewood*, the Ninth and Third Circuits, respectively, held that allegations like the Yees' state claims for relief. In *Azul Pacifico*, the Ninth Circuit affirmed a District Court judgment that an ordinance essentially similar to Escondido's had taken interests in an owner's property. All three decisions correctly held that the takings in question were "physical" takings. By granting permanent, possessory interests to residents and extinguishing the vital right to exclude others, the Escondido Ordinance likewise effects a physical taking.

The Court need not find a "physical" taking to reverse the judgment below since the Escondido Ordinance does not substantially advance any legitimate state interest and lacks the nexus between means and ends required by *Nollan*. The Escondido Ordinance confers valuable rights upon residents in place when Escondido voters approved the initiative, but it confers little or no benefit on future residents compelled to pay large premiums for used mobilehomes (or, more precisely, for the rights taken by the Ordinance and given to their predecessors). It confers no benefits whatever upon the owners of the property. The owners bear the economic impact, and their expectations are frustrated by a redistribution of interests in the property.

Thus, the Escondido Ordinance, as it is alleged to operate, takes Petitioners' property under any standard that might be applied. However their claims may be described, they have sufficiently alleged that interests in their property have been taken by operation of the Escondido Ordinance.

ARGUMENT

I. The Fifth Amendment Protects All Property, Including Leaseholds Created By Operation of Law.

Under the Constitution, private property may not be taken for public use without just compensation. This Court has held that the Constitution protects all property, real and personal, tangible and intangible.

> The term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States v. General Motors Corp.*, 323 U.S. 373 (1945). It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.* at 377-78.

PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 n.6 (1980). The Fifth Amendment has been invoked to protect such varied interests as leaseholds, *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976), and *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); rights of inheritance, *Hodel v. Irving*, 481 U.S. 704 (1987); trade secrets, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); materialmen's liens, *Armstrong v. United States*, 364 U.S. 40 (1960); mortgage liens, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); and valid contracts, *Lynch v. United States*, 292 U.S. 571 (1934).

The cases are as varied as the range of interests suggests. For that reason, this Court has explained:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid depends largely "upon the particular circumstances [in that] case."
>
> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (citations omitted).

Takings are more readily found when interference with property can be characterized as a physical invasion, but government interference with property interests may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose or if there is an unduly harsh impact upon the owner's use of the property. *Id.* at 124, 127. In appropriate cases, frustration of investment-backed expectations or destruction of particular rights in property have also been ruled "takings" of property. *Id.*

Property consists not merely of land, buildings or other tangible things, but of a bundle of rights to possess, use and dispose of those things. Constitutional analysis therefore proceeds from the factors identified in *Penn Central* and other precedents, as they affect the constitutionally-protected rights that inhere in property. Courts and commentators tend to classify taking claims as "physical" or "regulatory," but the range of precedents illustrates that these labels are convenient points of reference on a continuum, rather than discrete or mutually exclusive categories. Compensable takings cover a wide spectrum of government action: seizure of property for government use; dispossession for others' use; physical invasion or interference; appropriation of subsidiary interests in property; destruction of particular expectancies or rights; and appropriation of encumbrances and other rights created by contract or operation of law.[2] The "regulatory" and "physical" labels are variations upon the same theme: interference, deprivation or destruction of constitutionally protected rights to posess, use or dispose of property.

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[2] *See, e.g., Hodel*, 481 U.S. 704 (1987) (escheat to tribes of fractional interests in Indian lands that would otherwise pass by inheritance); *Armstrong*, 364 U.S. 40, (destruction of materialmen's liens by sovereign immunity); *United States v. Causby*, 328 U.S. 256 (1946) (overflight); *Portsmouth Harbor Land and Hotel Co. v. United States*, 260 U.S. 327 (1922) (gunfire over property); *Radford*, 295 U.S. 555 (1935) (mortgage lien taken by farm debt relief law); *United States v. Cress*, 243 U.S. 316 (1917) (repeated flooding).

Some takings are clearly "physical," others "regulatory"; and some have aspects of both. In *Nollan,* 483 U.S. 825, for example, this Court held that a "permanent physical occupation" had accurred when the California Coastal Commission conditioned issuance of a permit to build a home upon the owners' willingness to grant an easement across their private beach. In *Kaiser Aetna v. United States,* 444 U.S. 164 (1979) this Court found that imposition of a navigational servitude upon a private waterway extinguished the right to exclude others, which the Court characterized as an expectancy so fundamental that it could be taken without compensation and one that would cause actual physical invasion of Kaiser Aetna's private marina.

Other precedents involve deprivations of contingent rights that might be reduced to possession. In *Radford,* 295 U.S. 555, for example, the Court struck down a farm debt relief law that effectively deprived lenders of mortgage liens. Many years later, the Court relied upon *Radford* when it ruled that transfer of incomplete vessels to the United States had taken materialmen's liens in violation of the Fifth Amendment. *Armstrong*, 364 U.S. at 44.

According to the allegations in the complaints, the Escondido Ordinance grants the 1988 residents transferable possessory interests in the owner's property. Residents in place when the voters enacted the Ordinance may sell these rights and interests to the buyers of their choice, along with their mobilehome coaches, when they decide to move. An owner's rights of possession, use and disposition ordinarily include the rights to transfer lesser interests in the property, including leaseholds, easements and the like. In Escondido, many of these rights have passed to the residents by operation of the Escondido Ordinance, without compensation. Because ordinances

like Escondido's, operating in conjunction with state residency laws, impair rights of possession, use and disposition, including the important right to exclude others, three federal courts of appeals have held that appropriation of an owner's interest by operation of law is a physical taking. *Hall,* 833 F.2d 1270; *Pinewood,* 898 F.2d 347; *Azul Pacifico,* slip op. 15213.

The effect of the Escondido Ordinance on owners of mobilehome parks may be described in various ways: as physical occupation or invasion, extinguishment of attributes of ownership, redistribution of the bundle of rights between owner and tenant, appropriation of the right to collect rent, or a regulation that advances no substantial public purpose, since its principal effect is to enrich the 1988 residents at their successors' expense. Whatever the label, and however the effects are described, the interference with constitutionally protected rights of possession, use and disposition is clear.

Under the principles laid down by this Court, the effects of this Ordinance constitute a "physical" taking. The California court below suggested that *Hall* and its progeny are aberrations, rejecting any suggestion that the Escondido Ordinance effected a "physical" taking. *Amici* will demonstrate that *Hall, Pinewood* and *Azul Pacifico* represent logical applications of this Court's decisions. The Yees, whose claims are indistinguishable from those sustained in *Hall* and *Pinewood* and proved in *Azul Pacifico*, have alleged physical takings of their property. But whatever label applies, no matter how the interference with property rights may be described, constitutionally protected property rights have been taken without compensation.

When buyers pay tens of thousands of dollars in resale premiums for used mobilehome coaches — as Petitioners

alleged, and as found in *Azul Pacifico* — they must believe they are buying something. Mobilehomes are personal property, *Hall,* 833 F.2d at 1273, so any interests in the realty that residents obtain by operation of law have to come from the landowner. Under *Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229 (1984), Escondido may have the power to redistribute interests in realty, but if it wants to give 1988 residents interests in Petitioners' property, "it must pay for [them]." *Nollan,* 483 U.S. at 842.

II. The Escondido Ordinance Effects A Physical Taking.

In *Hall,* the Ninth Circuit, relying on this Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), "held that the challenged ordinance could be found to transfer a possessory interest in land to the mobilehome tenants, and thus constituted a physical occupation." *Azul Pacifico,* slip op. 15213, 15221. In *Pinewood,* the Third Circuit reached the same conclusion:

> [T]he physical invasion of their properties and the uncompensated creation of interests in them worked by the [ordinance] in connection with the state [residency] law is far more pronounced than that in *Loretto.* Here, there has been a permanent transfer of the appellants' possessory interests to each tenant to occupy a rent controlled pad. Thus, although the interest belongs to the appellants, the landlords, the effect of the law is to transfer the interest, without compensation, from the landlords to the tenants. Accordingly, a tenant may, by determining the purchaser of his mobilehome, select the new tenant for the park and command a premium for the alienation of the right to occupy the pad at a controlled rent to

> the complete exclusion of the appellants. The combined impact of the statute and the ordinance operates to deprive the appellants of their possessory interest in the pad permanently.

898 F.2d at 353.

Hall, Pinewood and *Azul Pacifico* are not aberrations but straightforward applications of *Loretto* and other precedents. Analysis must look past the "vulgar and untechnical sense of the physical thing" to "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *General Motors,* 323 U.S. at 377-78. The lower court's reasoning emphasizes the label and overlooks decisions of this Court which establish that "physical" takings encompass a variety of measures that indirectly dispossess owners or deprive them of their protected rights of possession, use and disposition. Deprivation of rights, rather than physical possession, is the essential quality. *See YMCA v. United States,* 395 U.S. 85, 92-93 (1969). Authorized occupation by third parties takes an owner's property as effectively as occupation by the government. *Loretto,* 458 U.S. at 432-33, n.9.

Government need not occupy property or even dispossess the owner to effect a "physical" taking. For example, in *Kaiser Aetna,* the Federal Government had asserted a navigational servitude over a private waterway. This Court ruled that "the Government's attempt to create a public right of access . . . goes so far beyond ordinary regulation . . . as to amount to a taking." 444 U.S. at 178. The Court explained that the Fifth Amendment protects "a number of expectancies embodied in the concept of 'property' — expectancies that, if sufficiently important, the Government must condemn and pay for." *Id.* at 179. The Court held that the " 'right to exclude,' so universally

held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Id.* at 179-80.

In *Loretto,* the Court held that "permanent physical occupation authorized by government is a taking," even though the physical occupation — installation of rooftop television cables and boxes — was insignificant. 458 U.S. at 426.

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property. . . . Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value. . . .

Id. at 435-36 (emphasis by the Court) (citations omitted). As in *Kaiser Aetna,* this Court's conclusion flowed from the legal consequences, rather than the occupation or intrusion — unobtrusive cables and boxes in *Loretto,* passage through a private waterway in *Kaiser Aetna.*

Occasional or intermittent intrusion may also take property. In *Nollan,* the Court ruled that "a 'permanent physical occupation' has occurred . . . where individuals are given a . . . continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises." 483 U.S. at 832. Citing *Kaiser Aetna* and *Loretto,* this Court stressed the importance of the right to exclude others, " 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " 483 U.S. at 831.

Taken together, these precedents make clear that "physical" takings encompass much more than seizure of property, occupation of land, destruction of land by flooding or other total dispossession of the owner. In each case, this Court has examined the facts and the effects of government action upon rights of possession, use and disposition. Where those rights, or such related rights as the right to exclude, have been substantially infringed, a court may find a "physical" taking, even though the owner retains substantial economic and practical use of his property as a whole, as in *Kaiser Aetna, Loretto* and *Nollan.*

Chief Justice Rehnquist applied these principles to rental housing in *Fresh Pond Shopping Center, Inc. v. Callahan,* 464 U.S. 875 (1983) (Rehnquist, J., dissenting), and implicitly recognized that "physical" is not an entirely apt label. Local rent controls in Cambridge, Massachusetts, coupled with state law, effectively precluded evictions, demolition and redevelopment of the property. This "deprive[d] appellant of the use of its property in a manner closely analogous to a permanent physical invasion, like that involved in [*Loretto*]." *Id.* at 877.

In *Seawall Assocs. v. City of New York,* 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989), New York's highest court struck down an ordinance that compelled owners of one-room apartments to rehabilitate and rent their properties, and forbade conversion and demolition. Relying upon *Nollan, Loretto* and *Kaiser Aetna,* the New York court analyzed the effects of the ordinance upon the owner's rights of possession, use and disposition and found that:

> Where, as here, owners are forced to accept the occupation of their properties by persons not already in residence, the resulting deprivation of rights in those properties is sufficient to constitute a physical taking for which compensation is required.

74 N.Y.2d at 103, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546.

In *Hall,* the Ninth Circuit applied similar reasoning to allegations essentially identical to these Petitioners':

> When viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical occupation, as in *Loretto, Kaiser Aetna* and their precursors. Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in *Loretto.*

> The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause. . . . [T]he ordinance directs the landlord to give tenants a lease, a recognized estate in land, lasting indefinitely. Moreover, the landlord's residual rights in the property are largely at the mercy of his tenants . . . . If a tenant moves, the tenant alone decides who will be his successor by selecting the buyer . . . .
>
> Moreover, because of the way the ordinance is alleged to operate, the tenant is able to derive an economic benefit from the statutory leasehold by capturing a rent control premium when he sells his mobilehome. In effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use . . . . If the Halls' allegations are proven true, it would be difficult to say that the ordinance does not transfer an interest in their land to others.

833 F.2d at 1276-77.

The Escondido Ordinance, operating in conjunction with California's Mobilehome Residency Law, dispossesses owners, extinguishes the right to exclude others, and grants residents a statutory leasehold, with bargain rent, that they can sell along with their mobilehome coaches. Where a possessory interest in realty has been taken by operation of law, the Court should conclude that a "physical" taking has occurred. By dismissing Petitioners on the pleadings, the California courts failed to undertake the ad hoc, factual inquiry that this Court's precedents require.

III. The Escondido Ordinance Effects a Taking Under Traditional Takings Analysis.

The Court need not find that Petitioners have alleged a physical taking in order to reverse the judgment below. The Escondido Ordinance offends constitutional principles laid down by this Court since Justice Holmes' seminal opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). The property interests appropriated by the Escondido Ordinance enjoy Fifth Amendment protection, whether or not its effects are characterized as a "physical" taking.

Permanent physical occupations or invasions are takings *per se* because they impair or destroy rights of possession, use and disposition. Other government action with similar legal and practical effects must also be compensated, whether or not the particular means involve "physical" dispossession of the owner, or "physical" interference with his use. In *Pennsylvania Coal,* Justice Holmes observed that:

> [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. 415-16. Regulations of land use may effect takings if they:

> [do] not substantially advance legitimate state interests or [deny] an owner economically viable use of his land. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests.

Agins v. Tiburon, 447 U.S. 255, 260-61 (1980) (citations omitted). As this Court noted in *Penn Central* and later decisions, "these essentially ad hoc, factual inquiries" involve such factors as economic impact, interference with investment-backed expectations, and the character of the governmental action. *Penn Central,* 438 U.S. at 124. Actions that extinguish "fundamental attribute[s] of ownership," such as the right to exclude others, may also constitute takings. *Agins,* 444 U.S. at 262 (citing *Kaiser Aetna,* 444 U.S. at 179-80). Under these principles, the Court has invalidated government action that imposes easements, impairs creditors' liens, inheritance rights and a variety of other interests in property.[3]

Those principles apply with equal force to the Escondido Ordinance, which deprives owners of rights of possession, disposition and use, extinguishes the right to exclude others, and grants permanent leasehold interests to residents. If Escondido voters wish to give interests in Petitioners' property to the 1988 tenants, just compensation is due.

A. The Escondido Ordinance does not substantially advance legitimate state interests.

The Escondido Ordinance allows no rent increase when mobilehomes are sold. Rent increases are misdemeanors, unless authorized by the City Council (sitting as the Mobilehome Park Rental Review Board) after formal

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[3] *See supra* note 2.

proceedings. Since the Ordinance passed by the voters contains no findings or recitals, the voters' intent is uncertain. Justifications advanced by Respondent's counsel include inequities caused by scarcity and protection of the mobilehome owners' investment. Respondent's Brief in Opposition at 27. Under *Nollan,* "evident constitutional propriety disappears" if regulatory exactions "utterly fail[] to further the end advanced as the justification." 483 U.S. at 837. Nollan requires an adequate nexus between ends and means. *Id.* at 834 n.3, 837, 841. The Escondido Ordinance fails this test.

The Escondido Ordinance does nothing about scarcity. On the contrary, rent controls like Escondido's that forbid rent adjustments when mobilehome coaches are sold in place may discourage new construction.[4] The Ordinance does nothing to alleviate the effects of scarcity upon new residents, who must pay large premiums — nominally for the used mobilehome, but actually for the mobilehome and statutory leasehold. To save rent dollars, the buyer must take a larger mortgage; but overall housing costs remain unchanged. For these reasons, the Ninth Circuit in *Azul Pacifico* was "unable to see how this transfer of wealth from one group of citizens to another can serve any rational governmental purpose." *Azul Pacifico,* slip op. 15213, 15228.

The Escondido Ordinance cannot even achieve its nominal purpose of controlling rents. New residents compelled to pay large premiums for used mobilehome coaches effectively pay far more than the purportedly "fair" controlled rent. For residents in place at the time of the June

[4]California recently amended the Mobilehome Residency Law to exempt newly constructed mobilehome spaces from local rent controls. Cal. Civ. Code § 798.7 (West 1991).

1988 vote, controlled rents are effectively reduced by premiums collected upon resale of their mobilehome coaches when they move away.

From the record in *Azul Pacifico,* the Ninth Circuit found a potential justification in the desire to protect owners against "unscrupulous landlords," lest exorbitant rents depress home prices to distress levels. *Id.* There is no such record here, or any indication of legislative purpose, apart from counsel's assertions. To demand exorbitant rents would be contrary to the owners' own interests, since such demands would deter listings and sales, and would thus preclude *any* rent increase that might be permitted upon sale of a mobilehome in place. The risk of isolated abuse does not justify indiscriminate, uncompensated appropriations of the owners' property. Government does not generally police unfair business practices by appropriating property interests from all participants in a particular business. The disputed provisions of the Escondido Ordinance do not substantially advance any legitimate interests.

With similar reasoning, the New York court in *Seawall* found that compulsory rehabilitation and rental of efficiency apartments would do little to resolve homelessness, since there was no assurance that the apartments would be rented to homeless or potentially homeless people and families. "[A] tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required . . . [to] cure [homelessness]." 74 N.Y.2d at 112, 446 N.E. 2d at 1069, 544 N.Y.S. 2d at 552. The New York court contrasted the nexus between means and ends in other regulations sustained by the courts. In *Penn Central,* for example, "the Landmarks Law had the direct and immediate effect of saving a historic landmark, Grand Central Station." *Id.*

The Escondido Ordinance enriches those who happened to be residents at the time of enactment; but it does nothing for any subsequent residents compelled to pay large premiums for used mobilehome coaches; and it confers no benefit whatsoever on property owners.

B. The Escondido Ordinance effects a taking under the criteria of *Penn Central*.

In taking cases, this Court examines the factors identified in *Penn Central*, and weighs the public and private interests. The character and economic impact are clear from the allegations (which are essentially identical to those proved in *Azul Pacifico*): creation of leasehold interests in the owners' property, deprivation of rights of possession and disposition, including the right to exclude others, and a wealth transfer commensurate with the interests transferred. These effects frustrate reasonable, investment-backed expectations.

The Escondido Ordinance enriches residents in place at the time of the June 1988 election. New residents must pay large premiums to those in place. The park owners' incomes are reduced. Owners cannot adjust rents when residents move away and sell their mobilehomes, and their property rights are impaired, while the 1988 residents pocket windfalls. Since the value of any income property is a function of income, which declines in real terms (*i.e.*, adjusted for inflation) and cannot be adjusted when resales occur, mobilehome park values will decline. Plainly, reallocation of ownership rights between owners and tenants has substantial, adverse economic impact upon mobilehome park owners.

Amici do not of course contend that reductions in income or property value "take" property by themselves; but adverse economic impact is a relevant consideration,

especially in the absence of *any* benefit to property owners who bear the costs. In *Penn Central*, as in zoning cases, the Court has upheld regulations because they benefited all citizens in varying degrees, including those whose properties are directly burdened. All property owners benefit, for example, from zoning regulations that assure orderly development. The landmark preservation law at issue in *Penn Central* benefited all citizens, and permitted Penn Central to mitigate its effects by selling transferable development rights. 438 U.S. at 134-37.

The economic effects of the Escondido Ordinance differ fundamentally from the effects of zoning and other land use regulations that affect property values, since there is no "reciprocity of advantage". *Pennsylvania Coal*, 260 U.S. at 415. Here, the reduction in value represents a transfer of property rights from owners to tenants, rather than a decline in the value of the entire bundle of rights that originally belonged to the park owners. These facts were proved in *Azul Pacifico*, where the court found that resale premiums equalled "the capitalized value of both the use value (foregone rents) and the possessory interest (the right to exclude)," and correspondingly reduced the value of the mobilehome park. *Azul Pacifico*, slip. op. at 15213, 15232 and n.9.

The impact upon owners' investment-backed expectations is similar. Owners hope to operate their properties profitably, and later sell what they own to another investor, also for a profit. Investments may fare well or badly, depending upon market conditions, management skill and other factors, but investors in mobilehome parks are entitled to expect that they will retain essential rights to possess, use and dispose of their property, including lesser interests in the property. According to the allegations in the complaint, which must be accepted, the

Escondido Ordinance transfers valuable rights in the realty to the residents, who may sell those rights to possess and use the owners' land. This redistribution of property interests, and its economic consequences — a windfall to the 1988 residents which reduces or even forecloses any prospect for eventual capital gain — interferes with, even destroys, the expectations that led owners to invest in or develop mobilehome parks.

When mobilehome coaches change hands for tens of thousands of dollars more than comparable coaches without rent control, more than serendipity is at work. Buyers believe they get something for their money, and sellers who demand large premiums know that they are selling something valuable, a permanent bargain leasehold. Since the mobilehome is personal property that would command a far lower price if removed, what residents sell in addition to the home can only be an interest in the realty: a transferable leasehold interest, created by operation of law, that assures low rents and permanent tenure. Leasehold interests, like easements, air rights, mineral rights, and other interests in real property, are part of the complete bundle of rights that constitute the fee. Like all property, those interests enjoy constitutional protection, and can be taken only after payment of just compensation.

The appropriation of statutory leaseholds alleged in the complaint may be characterized as a "physical invasion," the extinguishment of fundamental attributes of ownership, an exaction from owners that advances no legitimate state purpose, or the appropriation of a leasehold. But whatever label or characterization is applied, the severe interference with constitutionally protected rights of possession, use and disposition constitutes a "taking" of property under decisions of this Court.

CONCLUSION

For these reasons, and those urged by Petitioners, the judgment of the California Court of Appeal should be reversed with instructions to remand these consolidated cases for trial.

Dated: November 27, 1991

Respectfully submitted,

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(13)

No. 91-1947

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IN THE

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MILDRED D. TACEY,

Petitioners,

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Respondent.

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA

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Respondent.

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the California Association of REALTORS® and the National Association of REALTORS® respectfully submit this amicus curiae brief in support of Petitioners.

Amicus curiae California Association of REALTORS® ("C.A.R.") is a voluntary trade association whose members consist of local Boards of REALTORS® in California and those persons licensed by the state of California as real estate brokers and salespersons who are members of local boards. C.A.R. is the largest state trade association in the United States and has 180 affiliated Boards of REALTORS® and over 135,000 members.

The mission of C.A.R. is to serve in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses successfully with integrity and competency. Moreover, C.A.R. serves to promote, through collective action, the preservation of private property rights.

Amicus curiae National Association of REALTORS® ("N.A.R.") is also a voluntary, non-profit association, comprised of over 750,000 persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraisal, management, and counseling. N.A.R. also includes among its members approximately 1,900 State and local Boards and Associations of REALTORS®, including C.A.R.

N.A.R. was created in 1908 to promote and encourage the highest and best use of the land, to protect and promote

private ownership of real property, and to advance professional competence in the rendition of real estate services.

The members of C.A.R. and N.A.R. (hereinafter collectively referred to as "REALTOR® Amici") further believe that every person should have the right to acquire real property with confidence and certainty that the value of such property will not be unduly diminished or jeopardized by governmental action at any level unless just compensation is paid.

REALTOR® Amici believe the continuing demand for rental housing can best be met by private investors willing to take long-term capital risks, and support a mutually beneficial owner-rental occupant relationship which will encourage a continuing supply of adequate and affordable housing. With the extensive proliferation of land use regulations that greatly restrict the uses of private property, REALTOR® Amici, their members and all the property owners they represent have a significant interest in the outcome of this case and the law it establishes.

Not only is there a need to resolve the conflict between the decision of the California Court of Appeal and those of the United States Courts of Appeals for the Third and Ninth Circuits, there is a need for further guidance from this Court as to when a governmental regulation so undermines private

property rights that compensation under the United States Constitution is required.

Counsel for REALTOR® Amici are familiar with the questions involved and the scope of their presentation and believe that further argument on the issues discussed by this amicus curiae brief will be helpful to this Court.

SUMMARY OF ARGUMENT

The decision of the California Court of Appeal is incorrect as the combined effect of the California Mobile Home Residency Law and the Escondido mobile home rent control ordinance is to deprive petitioners of their property without just compensation. REALTOR® Amici agree with the United States Courts of Appeals for the Third and Ninth Circuits that such mobile home rent control laws effect a physical occupation of property constituting a per se taking requiring compensation for the value of the real property interests taken from mobile home park owners and transferred to mobile home tenants.

REALTOR® Amici submit that the rent control law also constitutes a regulatory taking entitling petitioners to just compensation. Whether governmental action amounts to a regulatory taking requires evaluation of the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations. Even though

this case comes to this Court upon a demurrer, there is no real dispute that the challenged law effects a transfer of fundamental real property rights and corresponding wealth from the landowner to the tenant, a drastic governmental action which has a severe economic impact completely at odds with a landowner's investment expectations.

While this Court has identified the above general criteria to be applied in the takings clause analysis, it has also expressly recognized that such evaluation is difficult because of the lack of precise rules and detailed guidelines. This case presents an opportunity for this Court to provide desperately needed guidance to lower courts as well as to lawmakers with respect to jurisprudence concerning regulatory takings.

Finally, the rent control law is invalid because it does not substantially advance a legitimate governmental interest. It does not further the goal of providing more affordable housing. Indeed, its likely ultimate result is less available housing and more expensive mobile homes.

ARGUMENT

A. The Mobile Home Rent Control Law Constitutes A Per Se Taking Requiring Just Compensation.

1. The Mobile Home Rent Control Law Extinguishes Valuable Real Property Possessory Interests Of The Landlord.

Petitioners' complaint alleges that the mobile home rent control law has effected a transfer of valuable possessory interests in their real property to their tenants. Even though this case is at the pleading stage, there is no question that this is the result of the law. Indeed, the California Court of Appeal in this case states, "No one can dispute that Escondido's rent control ordinance, like the ordinance in *Oceanside*, effects a transfer of value from landlords to tenants." *Yee v. City of Escondido,* 224 Cal.App.3d 1349, 1354, 274 Cal.Rptr. 551 (1990), *review denied,* Cal. LEXIS 353 (Cal. Jan 24, 1991).

In a challenge to a similar mobile home rent control scheme, the Third Circuit Court of Appeals noted that it was alleged that the tenants "are given valuable and alienable

possessory interests to occupy park pads with a controlled rent -- a possessory interest which belongs to the appellants." *Pinewood Estates of Michigan v. Barnegat Township Leveling Board,* 898 F.2d 347, 352 (3rd Cir. 1990). In fact, the tenant who receives the transferred property interests, for nothing, realizes monetary compensation when that tenant sells the mobile home to an incoming tenant. The Court of Appeals found that the premium paid by the new tenant is a payment "to the departing tenant of what amounts to rent for the use of the pad. This 'rent' is for the possessory interest of the landlord. Thus, this is a case where other persons, tenants, have been granted interests in property which properly belongs [sic] to the appellants, the landlords." *Id.* at 353; *see also* Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol,* 35 UCLA L.REV. 399, 420-423 (1988) (hereinafter cited as Hirsch & Hirsch).

Similar allegations were made in *Hall v. City of Santa Barbara,* 833 F.2d 1270, 1276 (9th Cir. 1986), *cert. denied sub nom. Santa Barbara v. Hall,* 485 U.S. 940 (1988) about another comparable California mobile home rent control law. In *Hall* the Court concluded that mobile home park owners would have a constitutional right to compensation for the taking of their property if they could prove,

> that the . . . [challenged ordinance] has transferred a possessory interest in their land to each of their . . . tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferrable, has an established market and a market value.

Hall v. City of Santa Barbara, 833 F.2d at 1276. Applying *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), the Courts in *Pinewood Estates* and *Hall* opined that valid causes of action had been pleaded and that if these elements were satisfied, the rent control ordinances would effect a physical occupation of the landowner's property constituting a per se taking under the Fifth Amendment.

The Ninth Circuit Court of Appeals subsequently held that with respect to a mobile home rent control scheme virtually identical to that imposed in Escondido, there was a "physical occupation" of the real property constituting a per se taking requiring just compensation. *Azul Pacifico Incorporated v. City of Los Angeles,* 1991 U.S. App. LEXIS 26335 (9th Cir. Nov. 1, 1991). It affirmed the District Court's finding, after trial on the

merits, that each of the elements identified in *Hall* and *Pinewood Estates* had been satisfied in that case. *Id.* at 1-2. While REALTOR® Amici agree that the California Mobile Home Residency Law (CAL. CIV. Code §§ 798 - 799.6 (Deering's 1990), hereinafter cited as "MHRL") and the Escondido mobile home rent control ordinance necessarily effect a physical occupation of a landlord's property, they submit that this constitutes a regulatory taking as well.

B. Imposition Of The Escondido Mobile Home Rent Control Law Results In A Regulatory Taking.

1. The Regulatory Taking Analysis Requires A Factual Ad Hoc Evaluation.

Decisions of this Court establish that governmental regulation short of physical invasion may constitute a taking because such action may result in "as complete [a loss] as if the [government] had entered upon the surface of the land and taken exclusive possession of it." *United States v. Causby,* 328 U.S. 256, 261 (1946).) While this Court has recognized that there is no "set formula" to determine a regulatory taking and indeed, that the "question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," (*Penn Central Transportation Co. v.*

City of New York, 438 U.S. 104, 123 (1978)) it has identified the following factors which must be considered in such an evaluation: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action." *Id.* at 124 (citation omitted); *see also, Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

As Justice Holmes advised, "[I]f regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In addition, the "Fifth Amendment's guarantee . . . [is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be born by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Since there is no set formula for determining when a taking has occurred, the question of "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transportation v. City of New York*, 438 U.S. at 124 (citation omitted).

This case presents the Court with an opportunity to apply and further define the above multifactor test. Although many commentators have written about "investment-backed expectations" and the other factors mentioned in the leading regulatory cases, none have been able to discern a consistent definitional framework sufficient to place owners and regulators on notice of the consequences of their actions.[1] REALTOR® Amici specifically urge this Court to clarify that regulations such as this mobile home rent control law improperly interfere with property owners' rights and investment-backed expectations so as to constitute a compensable taking.

2. The Economic Impact Of The Mobile Home Rent Control Law Is Severe.

As noted above, the economic impact of the law is an immediate, irrevocable transfer of wealth from landlord to tenant. The economic impact is massive. For example, in *Azul*

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[1]See, e.g., Rose-Ackerman, *Against Ad Hocery: A Commentary on Michelman*, 88 COLUM. L. REV. 1697 (1988) (arguing that the uncertainty created by ad hoc inquiry is detrimental to the real estate community and the economy as a whole); Epstein, *An Outline of Takings*, 41 U. MIAMI L. REV. 3 (1986); Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 J. OF URB. AND CONTEMP. L. 3 (1987) (concluding that the test may as well be ignored); Michelman, *Takings*, 88 COLUM. L. REV. 1600 (1988).

Pacifico the district court calculated damages, based on "the average premium charged on" sale, at $20,880 per mobile home sold. *Azul Pacifico v. City of Los Angeles*, 1991 U.S. App. LEXIS at 14. "Diminution in property value, standing alone" may not establish a taking. *Penn Central Transportation v. City of New York*, 438 U.S. at 131. Yet, the challenged rent control law so dramatically impacts the financial aspects of mobile home park ownership and so radically changes the economic and legal relationship between landlord and tenant that it constitutes a regulatory taking.

3. The "Character Of The Governmental Action" Is That It Substantially Interferes With The Landowners' Real Property Rights.

"In deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with the rights. . . " *Penn Central Transportation v. City of New York*, 438 U.S. at 130.

The necessary magnitude of interference with property rights has not been precisely set forth or addressed by this Court under the factual and legal circumstances presented by

this case. However, the Court "must consider whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" *Penn Central Transportation v. City of New York*, 438 U.S. at 136 (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. at 413).

The critical property rights have been described "as the rights to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945). In addition, "one of the essential sticks in the bundle of property rights is the right to exclude others." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979). Any interference with such right must be evaluated to determine whether there has been a taking.

The state and local mobile home laws substantially interfere with landlords' property rights by transferring them in perpetuity to the tenant. The impact is severe. The tenant is given a lifetime possessory interest in the property owner's land (mobile home pad) which the tenant can sell, use or dispose of as the tenant desires. "This perpetual estate in essence transmutes an at-will tenancy into a relatively permanent estate in land. The result of these changes in the law is that a tenancy . . . [has] become tantamount to a fee ownership, . . ." Hirsch & Hirsch, *supra* p. 7, at 421.

Even if all aspects of property ownership were not extinguished by the rent control law, that will not preclude a finding that there has been a regulatory taking.

> [W]e have recognized that regulations -- unlike physical invasions -- do not typically extinguish the 'full bundle' of rights in a particular piece of property. . . . This characteristic of regulations frequently makes unclear the breadth of their impact on identifiable segments of property, and has required that we evaluate the effects in light of the 'several factors' enumerated in *Penn Central Transportation*.

Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S. 470, 516 (1987) (Rehnquist, C.J., dissenting).

Here the dramatic redistribution of property rights by the Escondido rent control law operating in combination with the MHRL demonstrates that there has been a taking.

In ruling that a New York law restricting development of the air space above Grand Central Station did not violate the takings clause, this Court cautioned that "the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of

the regulation on the . . . site." *Penn Central Transportation v. City of New York*, 438 U.S. at 136. The impact on a mobile home park owner's site is not only dramatic but no alternatives are available to the landlord to make up his loss.

Thus, this case is distinguishable from *Penn Central Transportation*, in which the New York law did not transfer any of Penn Central's real property possessory interests to anyone else. Penn Central was not even prohibited from all construction above the Grand Central terminal site. In fact it was allowed to recoup any loss it might sustain at that site by transferring development rights it held with regard to the terminal to other land parcels nearby. *Penn Central Transportation v. City of New York*, 438 U.S. at 137.

More is involved here than a "mere loss of money" or "profit" as respondent asserts. This is not like *United States v. Sperry Corp.*, 493 U.S. 52 (1989), in which no interests in real or personal property were involved. While monetary values, of course, are being transferred, so too are fundamental possessory interests in real property.

4. The Mobile Home Rent Control Law Frustrates Landowners' Reasonable Investment-Backed Expectations.

As this Court recognized in *Penn Central Transportation*, "[A] state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central Transportation v. City of New York*, 438 U.S. at 127. Thus, in *Kaiser Aetna v. United States*, 444 U.S. at 178, this Court found that the "Government's attempt to create a public right of access to the improved pond" interfered with Kaiser Aetna's "'reasonable investment backed expectations.'" *PruneYard Shopping Center v. Robins*, 447 U.S. at 84.

The challenged mobile home rent control law contravenes the reasonable investment-backed expectations of the owner of the property. Because the rent control ordinance depresses rents below market, the value of the mobile home upon sale by the existing tenant is increased by a premium in a comparable amount; this premium, a windfall to the tenant and loss to the landowner, clearly was not anticipated by the landowner when making the investment in the mobile home park. It is not a reasonable expectation of landowners that

valuable, marketable and alienable possessory interests in their land will be transferred to their tenants in perpetuity without any compensation to them.[2]

5. This Regulation Goes "Too Far."

While the determination of what constitutes a regulatory taking admittedly may be ad hoc, the challenged rent control law, in the words of Justice Holmes, "has gone too far," because it immediately and irrevocably causes a massive transfer of wealth and real property possessory rights from one private party to another. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), although unable to decide on the merits of the case because of procedural deficiencies, this Court made a statement that could be construed to clarify the concept of when a regulation goes "too far" as "the point at which the regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Id.* at 199 (footnote omitted); *see also, Pennsylvania Coal v. Mahon*, 260 U.S. at 413. The challenged rent control law is obviously onerous. It also "has the same

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[2]As this Court held in *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), even a temporary unexpected restriction of use of property can constitute a regulatory taking.

effect as an appropriation of property"; it is tantamount to a physical occupation depriving landowners of their basic property rights.

6. The Policy Consideration Of Avoiding Unfair Burdens On Private Individuals Supports The Conclusion That The Challenged Law Constitutes A Regulatory Taking.

The policy underlying the takings clause, that the public should not force upon one individual more than his just share of the burdens of government, applies in this case. *See, Nollan v. California Coastal Commission,* 483 U.S. 825, 841 (1987); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 325 (1893). Assuming arguendo that any legitimate governmental purpose is served by the mobile home rent control law, the monetary burden is more properly imposed on society as a whole rather than upon individual mobile home park owners. As the Ninth Circuit Court of Appeals correctly acknowledged: "The city may choose to create such a windfall for current coach owners. If it does so, however, it must spread the burden on all its citizens, not target one small class of individuals to foot the bill." *Azul Pacifico v. City of Los Angeles,* 1991 U.S. App. LEXIS at 36. It may be that governments faced today with

diminishing tax revenues may find it more economically "acceptable" to utilize land use regulations rather than eminent domain in an attempt to satisfy a community's needs. It is certainly more politically expedient and less expensive to pass an onerous regulation than to condemn property or fund social programs. However, if governments choose to attempt to accomplish such goals by destroying fundamental property rights and concurrently transferring wealth from one private party to another, particularly under the circumstances of this case, then there must be just compensation for such a taking.

C. The Mobile Home Rent Control Ordinance Does Not Further A Legitimate Public Interest.

To be valid at all, a regulation must pass very close scrutiny demonstrating that it substantially advances a legitimate state interest. *Nollan v. California Coastal Commission,* 483 U.S. at 841. Yet, the Escondido mobile home rent control law does not substantially accomplish the goal of providing more affordable housing for tenants. By restricting an owner's ability to adjust rents when mobile homes are sold in place, the ordinace obliges incoming tenants to pay large premiums, nominally for the used mobile home, but in actuality for the use of the owner's property. The increase in sales price in actuality represents additional rent for the use of the space which rightfully belongs to the landlord.

> [T]he purchaser of a mobile home who pays a premium for the right to keep the home in a mobile home park pays for the cost of the tenancy rather than for the mobile home. Thus, the premium is nothing more than rent for the pad which, depending upon whether the purchase is financed or paid for in cash, the new tenant pays during his tenancy or in advance.

Pinewood Estates v. Barnegat Township, 898 F.2d at 353 (footnote omitted). Similarly, in *Hall v. City of Santa Barbara,* the Court stated that, assuming appellants' allegations therein were true,

> the Santa Barbara ordinance will do little more than give a windfall to current mobile park tenants at the expense of current mobile park owners. If, as appellants allege, the ordinance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower-income families seeking access to rental units in mobile park homes.

Hall v. City of Santa Barbara, 833 F.2d at 1281.

Indeed, by increasing the sales price rather than amortizing the value as rent over the period of the lease, the rent control law makes it more difficult for new tenants who must marshal greater assets for a down payment for purchase of the coach. In an empirical study it was found that, "rent control tends to raise the housing cost of all mobile home owners, other than those who were renting at the time the rent control ordinance was enacted." *Hirsch & Hirsch, supra* p. 7, at 432; *Hall v. City of Santa Barbara,* 833 F.2d at 1281. In *Azul Pacifico* the Court found: "[V]acancy control does not help incoming tenants in the case of mobile homes. The coach buyer will have to pay the same effective rent for the pad whether or not the landlord is permitted to raise the rent at vacancy." *Azul Pacifico v. City of Los Angeles,* 1991 U.S. App. LEXIS at 18.

Thus, the departing tenant will receive monetary consideration that the landlord would otherwise get. The Court of Appeal in *Azul Pacifico* declared that it was "unable to see how this transfer of wealth from one group of citizens to another can serve any rational governmental purpose." *Id.* at 19.

The Court in *Azul Pacifico* did conclude that the ordinance therein served a "governmental purpose" of protecting existing tenants "from being forced to sell their coaches at distress-sale prices in the event the landlords were to set rents for new tenants so high that no one would want to buy the coach." *Id.* at 20. However, this is pure speculation. Apparently this was based on some testimony in *Azul Pacifico* "from mobile home tenants" that they *believed* they would have difficulty selling their mobile homes because landlords would raise the rents too high. *Id.* This testimony was obviously conjecture since the rent control law was in effect. Such unproven theory does not satisfy the rigorous "nexus" test recently enunciated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. at 837. Indeed, since the trial court in *Azul Pacifico* enjoined enforcement of the rent control ordinance in that case, presumably because it was invalid, it necessarily concluded there was no substantial public benefit furthered by it.

There is no evidence in the record in this case that in mobile home parks not subject to rent control, tenants are unable to sell their mobile homes because the rents are raised too high. Rather, there is a market for used mobile homes whose value is computed by traditional "blue book" methods for personal property. Hirsch & Hirsch, *supra* p. 7, at 401 n.5.

Rather than rely on unproved speculation, REALTOR® Amici respectfully direct this Court to the following conclusion of the aforementioned empirical study:

"In conclusion, if the purpose of rent control is to assure deserving tenants housing at a reasonable rent, the extent to which mobile home tenants are able to appropriate these benefits makes rent controls in a mobile home context unfair and perhaps even counterproductive in the long run." Hirsch & Hirsch, *supra* p. 7, at 448.

CONCLUSION

The decision of the California Court of Appeal should be reversed.

Respectfully submitted,

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NO. 90-1947

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOHN YEE et al,

Petitioners,

vs.

CITY OF ESCONDIDO,

Respondent.

ON CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEALS FOR THE STATE OF CALIFORNIA

BRIEF FOR NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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STATEMENT OF INTEREST OF AMICUS CURIAE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE

The New Jersey Department of the Public Advocate (hereinafter the "Department") is an independent cabinet-level department of New Jersey state government. N.J.S.A. 52:27E-2. It is mandated by statute to "represent the public interest in such administrative and court proceedings. . . as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as an interest arising from the Constitution, decisions of the courts, common law or other laws of the United States or of this State inhering in the citizens of this State or a broad class of such citizens." N.J.S.A. 52:27E-30. Since

its establishment in 1974, the Department has represented the interests of residents of New Jersey in a wide variety of areas including health, housing, income security, environment, and employment. It has come to play an important and continuing role in the protection and vindication of the interests and rights of the residents of New Jersey. See, e.g., Mount Laurel v. Department of the Public Advocate, 83 N.J. 522, 535-36, 416 A.2d 886, 893 (1980).

In this capacity, the Department has previously filed amicus briefs in cases before this Court. See, e.g., Fisher v. Berkeley, 475 U.S 260 (1986); United Building and Construction Trades Council v. Camden, 465 U.S. 208 (1984); Pennhurst State School v. Halderman, 451

U.S. 1 (1981); Kremens v. Bartley, 431 U.S. 119 (1977).

This case raises the issue of whether the combination of municipal rent control of mobile home parks without vacancy decontrol and state statutes protecting the right of mobile home owners living in mobile home parks to sell their own mobile homes violates principles of substantive due process under the Fourteenth Amendment to the Constitution or the prohibition on takings without just compensation under the Fifth and Fourteenth Amendments. It has broad consequences for residents of New Jersey.

Approximately 26,000 households in New Jersey reside in mobile homes. N.J. State Data Center, 1990 U.S. Census of Population and Housing, STF1, Profile 8 (1991). Approximately 90 percent of

these mobile homes are located in mobile home parks. Report and Recommendations of the Mobile Home Study Commission 93 (1980) (hereinafter "Mobile Home Report").[1] Following extensive study,

1. The Mobile Home Study Commission was established by the New Jersey Legislature. 1977 N.J. Laws, Jt. Res. No. 3. It was mandated to study the problems of restrictive zoning, regulation, financing, and taxation of mobile homes in New Jersey. Id. Its 250-page report provides a comprehensive picture of mobile homes and mobile home parks in New Jersey. The Legislature created a second commission, the Mobile Home Taxation Commission, specifically to study the issue of local taxation of mobile homes and mobile home parks. 1982 N.J. Laws, c. 204. Its report, Final Report of the Mobile Home Taxation Commission (1983) (hereinafter "Mobile Home Taxation Report"), together with the Mobile Home Commission Report, were the basis for a comprehensive package of legislation enacted by the New Jersey Legislature in 1983. 1983 N.J. Laws, cc. 386, 387, 388, 399, and 400 (codified in scattered sections of the New Jersey Statutes). The Legislature also had before it the decision of the New Jersey Supreme Court, Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J.

(Footnote continues on next page)

the New Jersey Legislature has adopted a comprehensive set of regulatory statutes governing mobile homes and mobile home parks. Affordable Housing Act of 1983, N.J.Laws, c.386 (codified at N.J.S.A. 40:55D-100 et seq.); Mobile Home Owners Rights Act, N.J.S.A. 46:8C-2 et seq., as amended by 1983 N.J.Laws, c. 399; 1983 N.J.Laws, c. 388 (codified as N.J.S.A 52:27D-121, regulating safety of mobile homes under the state construction code); 1983 N.J.Laws, c.400 (codified at N.J.S.A. 54:4-1.2 et seq., exempting

(Footnote continued from previous page)
158, 456 A.2d 390 (1983) (Mt. Laurel II), which analyzed mobile homes as a source of affordable housing, and a study prepared by the Center for Urban Policy Research of Rutgers-the State University at the joint request the New Jersey League of Municipalities and the New Jersey Builders Association, Burchell et at, Mount Laurel II: Challenge and Delivery of Low Cost Housing (1983) (hereinafter "Low Cost Housing").

mobile homes in mobile home parks from local property taxation and authorizing municipalities to charge mobile home owners service fees in lieu of property taxes).

Among other things, the New Jersey Legislature has prohibited evictions by mobile home park operators without just cause, N.J.S.A. 2A:18-61.1; prohibited park operators from refusing to rent spaces to purchasers of mobile home units in the park without just cause, N.J.S.A. 46:8C-3, and has delegated to municipalities the authority to regulate and license mobile home parks, N.J.S.A. 40:8C-8. Many of the municipalities that have concentrations of mobile home parks have exercised this delegated

power to regulate rents.[2] Few of these municipalities have elected to permit "vacancy decontrol."[3] The households who occupy these mobile homes thus have a large stake in the validity of this

2. There are 34 municipalities in New Jersey that have 200 or more mobile homes. Approximately 70 percent of all mobile homes in New Jersey are located in these communities. N.J.State Data Center, 1990 Census of Population and Housing, STF1, Profile 8 (1991). Of these, 17 municipalities have adopted rent regulations covering mobile home parks. N.J. Dept. Community Affairs, Rent Control Survey (1991). Approximately 10,000 mobile homes are located in these 17 municipalities. N.J.State Data Center, 1990 Census of Population and Housing, STF1, Profile 8 (1991).

3. "Vacancy decontrol" refers to provisions in some rent control regulations that permit the landlord to raise rents without limit any time the apartment (or, in this context, the mobile home pad) is vacant. Among the 17 municipalities in New Jersey with significant concentrations of mobile homes that regulate rents, only slightly more than a third (6) have vacancy decontrol. N.J. Dept. of Community Affairs, Rent Control Survey (1991).

comprehensive body of state and local regulation.

New Jersey's regulation of mobile homes and mobile home parks is essentially identical of that of California. In a recent decision, the Third Circuit Court of Appeals, adopting the legal theories advanced by petitioners in this case, held that mobile home park operators who challenged the combination of state regulation of mobile home parks and local rent regulation stated a valid claim of unconstitutional taking without just compensation. Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F.2d 347 (3rd Cir. 1989).

The Department has extensive experience and expertise in matters relating to affordable housing. Since its inception, it has represented the interests of lower income residents of

the state in a wide variety of legal and administrative proceedings to secure and protect their access to affordable housing. See, e.g., Southern Burlington County NAACP v. Mount Laurel, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975) (Mt. Laurel I) (affordable housing in the suburbs); Mt. Laurel II, supra (same); Holmdel Builders Association v. Holmdel, 121 N.J. 550, 583 A.2d 277 (1990) (affordable housing trust funds); Prowitz v. Ridgefield Park Village, 122 N.J.199, 584 A.2d 782 (1991) (property taxation of low income housing).

In particular, the Department has extensive experience in matters relating both to rent regulation and to mobile homes. The Department of has represented the interests of New Jersey

residents in numerous proceedings involving the legality and implementation of municipal rent control ordinances. See, e.g., AMN, Inc. v. South Brunswick Township Rent Leveling Board, 93 N.J. 518, 461 A.2d 1138 (1983); Property Ownwers Association v. North Bergen, 74 N.J. 327, 378 A.2d 25 (1977); Hutton Park Gardens v. West Orange, 68 N.J. 543, 350 A.2d 1 (1975). It appeared as amicus curiae before this Court in a case involving the legality of municipal rent control in Fisher v. Berkeley, supra. It has also represented the interests of New Jersey residents in proceedings involving public law and policy affecting mobile homes and mobile home parks. See, e.g., Mount Laurel II, supra; Taxpayers Association of Weymouth Township v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976). It played an

active role in proceedings before both the Mobile Home Study Commission and the Mobile Home Taxation Commission.

The Department appears as amicus curiae to address the significance of municipal rent control to mobile home owners in New Jersey and the impact of a decision invalidating such ordinances on the grounds asserted by petitioners.

The Department submits this brief pursuant to Rule 37.5. It is a subdivision of the State of New Jersey. It is authorized to appear in its own name through the head of the agency, the Public Advocate of New Jersey. N.J.S.A. 52:27E-29, 32(b), 42.[4]

4. The Department does not appear in this matter on behalf of the State of New Jersey, which is represented solely by the Attorney of General of New Jersey. N.J.S.A. 52:27E-42.

SUMMARY OF THE ARGUMENT

The combination of local rent control of mobile home parks without vacancy decontrol and state statutes forbidding park operators from refusing to rent mobile home park pads to purchasers of mobile home units located in their parks represents a rational and carefully balanced policy of economic regulation designed to benefit both mobile home park owners and mobile home owners. New Jersey law in this area appears to be essentially identical to that of California. In New Jersey, however, the origins and rationale of this balanced policy are laid out with exceptional clarity in the reports of two legislative study commissions and a series of legislative enactments. The history of New Jersey's regulatory

legislation illuminates the policies underlying California's regulation.

In adopting these regulations, the New Jersey Legislature did not merely intend to keep down the costs of living in a mobile home. Rather these regulations were part of a larger legislative strategy designed to respond to a series of policy concerns: 1) in a time of housing shortage, mobile homes were insufficiently utilized as a source of affordable housing; 2) exclusionary zoning barred mobile homes from all but a few communities; 3) mobile home owners were perceived prejudicially as persons without any tangible stake in their communities or homes; 4) the prevalence of exclusionary zoning and "closed" parks gave park operators a degree of monopoly power over mobile home owners. It enabled park operators to exploit mobile

home owners through excessive rents and fees and arbitrary rules.

This comprehensive regulatory strategy sought to address all of these concerns. Necessarily this entailed striking a legislative balance among conflicting goals. As a result individual elements of the strategy, when viewed in isolation, may seem to conflict with some of these goals. Both municipal rent control without vacancy decontrol and the statute forbidding mobile home owners from refusing to rent to purchasers of mobile homes on site were designed to reduce the power of park owners to exploit mobile home owners and to eliminate specific abuses: the charging of excessive rents and extortionate fees and the arbitrary refusal by park owners to re-rent pads to purchasers of existing mobile home

owners in the park. The New Jersey Legislature appreciated that these regulations taken together might increase both the initial prices that park owners might charge for mobile homes and the prices the mobile home owners might charge on resale. The Legislature deemed this an acceptable trade-off for reducing the power of park owners to exploit mobile home owners. Other components of the regulatory strategy sought to reduce prices by increasing opportunities and incentives for the construction and expansion of mobile home parks and fostering increased competition among parks.

Substantive due process merely requires that economic regulations bear a rational relationship to legitimate

governmental purposes. Placed in context, these regulations easily satisfy that requirement.

These regulations do not effect a regulatory taking in violation of the Takings Clause. They do not deprive park operators of a fair return on their property. Even if the Takings Clause imposes a higher standard of judicial review of the wisdom or efficacy of economic regulations than principles of substantive due process, these regulations easily meet that standard.

Finally, these regulations do not effect a physical taking of petitioners' property. Property owners who operate mobile home parks do so for the purpose of renting pads to third parties. They voluntarily elect to permit third parties to occupy their property. They need not do so. They can take pads off

the market and occupy the property themselves or use it for some other purpose. When state law forbids a park owner from refusing to re-rent to the purchaser of a mobile home in the park except for just cause, it is not forcing the property open his property involuntarily to third parties. He has already elected to do so. The government is merely placing reasonable restrictions upon his <u>choice</u> of third parties. Such restrictions do not constitute a taking.

The purported additional profit that this regulatory scheme permits the seller of a mobile home to reap adds nothing to petitioners' case. This additional profit is solely the consequence of the regulatory scheme itself. If petitioners prevail and the regulatory scheme is struck down, the purported additional profit does not

fall to the park operator; it simply disappears. That the park operator's tenant might make an additional profit from the regulatory scheme does not deprive the park operator of anything that is rightfully his.

As illuminated by the legislative history of regulations in New Jersey, these regulations viewed in context are designed to foster the availability of mobile homes and mobile home parks as affordable housing while depriving park operators of the opportunity obtain excessive rents and fees. The regulations do not make park owners them bear any unfair burden, they merely restrict park owners to the profits they could make if economic markets functioned more freely and normally.

ARGUMENT

POINT I

THE COMBINATION OF STATE AND LOCAL REGULATION OF MOBILE HOMES REPRESENTS A RATIONAL AND CAREFULLY BALANCED POLICY OF ECONOMIC REGULATION AND IS A NEITHER A VIOLATION OF SUBSTANTIVE DUE PROCESS NOR AN UNCONSTITUTIONAL REGULATORY TAKING WITHOUT JUST COMPENSATION

A. The Combination of State and Local Regulation of Mobile Homes Represents a Rational and Carefully Balanced Policy of Economic Regulation

Contrary to the arguments of the petitioners, the combination of local rent control of mobile home parks without vacancy decontrol and state statutes forbidding park operators from refusing to rent mobile home park spaces to purchasers of mobile home units located in their parks represents a rational and carefully balanced policy of economic regulation designed to benefit both mobile home park owners and

mobile home owners. New Jersey law in this area appears to be essentially identical to that of California. See Pinewood Estates, 898 F.2d at 354. In New Jersey, however, the origins and rationale of this balanced policy are laid out with exceptional clarity in the reports of two legislative study commissions and a series of legislative enactments. The history of New Jersey's regulatory legislation illuminates the policies underlying California's regulation.

The New Jersey Legislature acted in response to four policy concerns. First, New Jersey suffers from an acute and continuing shortage of safe, decent affordable housing. Mobile Homes Report, supra at 2, 18-26, 29-33;

N.J.S.A. 40:55D-101(a)-(c).[5] Mobile homes potentially provide the most affordable non-subsidized housing available. Mobile Home Report, supra at 2, 52-57; Mobile Home Taxation Report, supra at 22; N.J.S.A 40:55D-101(e). In quality, modern mobile homes are virtually indistinguishable from conventional "stick-built" housing. Mobile Home Report, supra at 6; Mobile Home Taxation Report, supra at 22-24; N.J.S.A 40:55D-101(d). On-site, they appreciate steadily in value. Mobile Homes Report, supra at 195-96. It is

5. New Jersey continues to suffer from this housing shortage. A recent study by the state's Department of Community Affairs estimated that approximately 675,000 very low, low, and moderate income households in the state suffer from serious housing problems. N.J. Dept. of Community Affairs, State of New Jersey Comprehensive Housing Affordability Strategy (CHAS) 50 (Draft, August 21, 1991).

therefore desirable to foster the use of mobile homes and the creation of mobile home parks.

Second, mobile homes and mobile home parks have historically been a disfavored land uses in New Jersey. Mobile Home Report, supra at 61-132. More than 80 percent of all municipalities in state prohibit mobile home parks outright. Mobile Home Taxation Report, supra at 23. Those that permit them often do so on terms that are highly restrictive, for example limiting them to senior citizens. Mobile Home Report, supra at 99-103. As a result of these local exclusionary policies, mobile homes make up only a very small proportion of the housing stock and are concentrated in a handful of municipalities. Mobile Home Report, supra at 92-103; Mobile Home Taxation

Report, supra at 25; N.J.S.A 40:55D-101(d).[6]

Third, mobile home dwellers have historically been perceived as undesirable neighbors. They have been perceived as transients who have no stake in the community or even in their own homes. As a consequence, the perception has been that mobile home parks are a locus of undesirable (and perhaps criminal) activities and naturally and inevitably deteriorate into slums. Mobile Home Report, supra at 103-27. This perception is no longer accurate (if, indeed, it ever was). Mobile homes

6. Out of New Jersey's 567 municipalities, only 34 have more than 200 mobile homes. More than 70 percent of all mobile homes in the state are concentrated in these 34 communities. N.J. State Data Center, 1990 U.S. Census of Population and Housing, STF1, Profile 8 (1991).

are "mobile" more in name than in fact. The typical mobile home seldom leaves it original site during its useful life. Mobile Home Report, supra at 6; Cf. Koester v. Hunterdon County Board of Taxation, 79 N.J. 381, 386, 399 A.2d 656, 658 (1979) (describing difficulty and cost of removing a modern mobile home from its site). This perception must be overcome if mobile homes are to become a widely available housing option.

Fourth, approximately 90 per cent of all mobile homes in New Jersey are in mobile home parks. Mobile Homes Report, supra at 93. Mobile home owners and mobile home parks have a complicated relationship that leaves the mobile home owner potentially very vulnerable to exploitation by mobile home park operators.

Mobile home dwellers own their mobile homes. They rent "pads" from the mobile home park owner. The rental fee, however, does not include merely the physical space, but also a wide variety of services, including many services that other homeowners receive from municipal government, e.g., street maintenance, snow removal, street lighting, garbage removal, water and sewer service. Mobile Homes Taxation Report, supra at 13-14; N.J.S.A 54:4-1.3.

Many mobile home parks in New Jersey are "closed," i.e. one cannot bring a mobile home into the park. One must either purchase an existing mobile home in the park or purchase one from the park owner. See Hearing before the Mobile Home Taxation Commission 53-54 (May 19, 1983) (Statement of Emmanuel Brown, mobile home owner); Id. at 64-65

(Statement of Charles Reed, mobile home park developer and operator). The combination of exclusionary zoning and the prevalence of "closed" parks give the mobile home park owner a degree of monopoly power. He can price mobile homes well above the price a dealer could obtain. Mobile Home Report, supra at 61, Mobile Home Taxation Report, supra at 5-6, Low Cost Housing, supra at 364-65.

If the mobile home park owner evicts the mobile home owner and forces him to remove his mobile home, the mobile home owner loses, not only his place to live, but also most or all of the value of the mobile home, since the combination of exclusionary zoning and the prevalence of "closed" parks means that there is only a limited market in the state for used mobile homes not on a site. Indeed, the mobile home owner

cannot even move voluntarily without great financial loss, unless the park operator agrees to rent the pad to the buyer of the mobile home. This places the mobile home owner at the mercy of the park operator. It potentially permits the park operator to charge exorbitant rents. It also potentially permits him to charge extraordinary fees to permit the mobile home owner to sell his home on-site. As the Mobile Home Taxation Commission put it, the mobile home owner is a "captive" of the park operator. Mobile Home Taxation Report, supra at 5.

On the other hand, if the mobile home owner sells the unit, the purchaser, even if he intends to move it, may literally be unable to find another place to locate it. Mobile Home Taxation Report, supra at 5. The park operator,

not a party to this transaction, may find himself, however reluctantly, obliged to accept the new owner as a renter.

The New Jersey Legislature sought to respond to these concerns through a combination of means.

It permitted mobile home park operators to maintain closed parks as a fiscal incentive to encourage the establishment of mobile home parks. Park operators may exercise the exclusive right to make the first sale of a mobile home to be located on each pad. N.J.S.A. 46:8C-9.[7] The Legislature did so even though it understood that this would drive up the costs to the mobile home purchasers and impede the goal of

7. The Mobile Home Study Commission characterized this as authorizing a "modified closed park system." Mobile Home Report, supra at 63n.*.

making mobile homes a source of affordable housing.

The Legislature chose not to regulate the prices of mobile homes, either on initial sale or resale. Regulating the price on initial sale would have defeated the purpose of legitimating closed parks. The Legislature does not appear to have even entertained the idea of regulating resale prices. The Legislature was impressed by the fact that mobile homes on-site appreciate in value. Mobile Homes Report, supra at 195-96. Owners have a steadily increasing financial stake both in the mobile homes themselves and in the park in which they are located. The Legislature sought to foster this phenomenon as a means of countering the perception that mobile home dwellers are undesirable

neighbors. Regulating resale prices would have defeated this goal.

The Legislature required mobile home owners to submit prospective purchasers to the park operator for prior approval but prohibited mobile home park operators from refusing to rent pads to the purchasers of mobile home on site without good cause, N.J.S.A 46:8C-3(a), and prohibited operators from charging fees for agreeing to such rentals, N.J.S.A. 46:8C-2(e).

The Legislature also prohibited park operators from evicting mobile home operators except for good cause. N.J.S.A 2A:18-61.1.

The Legislature determined that mobile homes in mobile home parks should not be taxed as real property, since mobile home owners pay park operators for many services that other homeowners

receive from municipalities. N.J.S.A. 54:4-1.5. Instead, the Legislature authorized municipalities to charge service fees for those services that they do provide. N.J.S.A. 54:4-1.6

Finally, the Legislature authorized municipalities to regulate all aspects of the operation of mobile home parks, including rents. N.J.S.A. 46:8C-8.[8] Such rent regulation must assure the efficient operator a fair return, Mayes v. Jackson Township Rent Leveling Board, 103 N.J. 362, 366-67, 511 A.2d 589, 591 (1986), cert. denied,

8. The Mobile Home Taxation Commission, while acknowledging the arguments for comprehensive rent control of mobile homes, determined that this issue was beyond its mandate. Mobile Home Taxation Report, supra 5-6. In New Jersey, as in California, rent control has historically been a local function rather than a state function. See Inganamort v. Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973).

475 U.S. 1000 (1987), and must provide an administrative mechanism for resolving claims of hardship, Hutton Park Gardens, supra, 68 N.J at 575n.10, 350 A.2d at 18n. 10. Although the Legislature neither mandated nor prohibited vacancy decontrol, most municipalities that regulate rents in mobile home parks do not have vacancy decontrol. The policy rationale for this local legislative decision is clear. Rent control is intended to prevent the park owner to exploit his monopoly position to demand excessive rents from mobile home owners. Vacancy decontrol permits the park operator to demand such rents each time a pad is re-rented.

This complex body of state and local regulation, carefully tailored to balance the interests of park operators

and mobile home owners and to further the public policy of increasing the availability of mobile homes as affordable housing, has created a novel hybrid relationship between park operator and mobile home owner. The New Jersey Legislature clearly envisioned that these reforms would cause this relationship to evolve over time. It looked forward to the day when the absence of exclusionary zoning would vastly increase opportunities for development of mobile home parks and competition among park owners, perhaps obviating the need for such comprehensive state and local regulation.

The Legislature has actively sought to make this relationship beneficial to park owners. It has sought to foster greater opportunities for the creation and expansion of mobile home

parks by discouraging continuing exclusionary zoning. It has legitimized closed parks and permitted park owners to obtain an extraordinary profit in the initial sale of mobile homes. It has insulated park owners against some of the hazards of operation of mobile home parks. At the same time, by providing for state regulation or enabling municipal regulation, it has sought to diminish the vulnerability of tenants to exploitation by mobile home park operators.

B. The Combination of State and Local Regulation of Mobile Homes Does Not Violate Principles of Substantive Due Process.

The petitioners seek to extract two elements out of the complex regulatory relationship between park operators and mobile home owners and attack them in isolation. The petitioners

claim that the combination of state law forbidding park operators from refusing to rent to purchasers of mobile homes currently in the park without just cause and local rent regulation without vacancy decontrol fails to satisfy the minimum requirements of substantive due process.

As illuminated by the legislative history of these regulations in New Jersey, these arguments are clearly wrong. Petitioners assert that the only justification for these regulations would be to keep mobile homes affordable. That, however, is but one of the justifications for these regulations. The New Jersey Legislature had a more complex objective. It certainly desired to foster mobile homes as a source of affordable housing. It also sought simultaneously to encourage the

creation of mobile home parks, even if that had the effect of making mobile homes somewhat less affordable. It recognized that the prevalence of closed parks and exclusionary zoning made mobile home owners to some degree "captives" of park operators and sought to protect mobile home owners from park operators' exploitation of that fact to charge excessive rents and fees. It also sought to neutralize the impression that mobile home owners are transients without a stake in their homes, parks, or communities, and therefore to create circumstances in which mobile homes retain their value or appreciate. The goals are in conflict, and the Legislature was obliged to balance them, exercising its best legislative judgment.

Viewed in isolation, each of the provisions of the regulatory scheme may seem to conflict with some the legislative goals. The New Jersey Legislature appreciated that if park owners were given the exclusive right to sell mobile homes to renters of vacant pads, this might result in prices for new mobile homes rising. It deemed this an acceptable trade-off for giving property owners a fiscal incentive to construct mobile home parks. It appreciated that if the tax burdens of mobile home owners were reduced by substituting municipal service fees for real property taxes, the price of used (and even new) mobile homes might rise. It deemed this an acceptable trade-for a more equitable and consistent tax policy.

In general, the Legislature recognized that any public regulation that

increases the attractiveness of a particular park, whether it be exclusionary zoning that restricts competition or municipal rent control that reduce rent levels, could increase the price that purchasers of mobile homes on site would pay. In particular, it expressly acknowledged that one consequence of prohibiting park owners from refusing to rent to purchasers of mobile homes in the park was the this would increase both the initial price of mobile homes sold by the park operator and also the price on resales by mobile home owners. Mobile Home Report, supra at 63n.*. It was prepared to accept this possibility as a trade-off for depriving park owners of some of the benefits of the monopoly power that they otherwise held over mobile home owners.

Taken as a whole, however, the various components strike a balance that advances all the Legislature's purposes.

Thus, considered in the context of the regulatory scheme as a whole, the challenged provisions are rationally related to a legitimate governmental purpose. It is now well-established that government has broad discretion to engage in economic regulation, including regulations of price. Pennell v. San Jose, 485 U.S. 1, 11-14 (1988); Federal Communications Commission v. Florida Power Corp., 480 U.S. 245, 253 (1987); Olson v. Nebraska ex rel Western Reference and Bonding Ass'n, 273 U.S. 418 (1941); Nebbia v. New York, 291 U.S. 502 (1934). Courts have no power under the Due Process Clause to second-guess the wisdom or the probable efficacy of such regulatory policies.

So far as the requirement of due process is concerned, and in the absence of other consitutional restrictions, a state is free to adopt whatever economic policy may reasonable be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purposes. The courts are without authority either to declare such policy; or, when it is declared by the legislature, to overrule it. If the laws passed have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders the court functus officio. . . . With the wisdom of the policy adopted, with the adequacy or practicality of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. [Nebbia, 291 U.S. at 537.]

As this Court recently reaffirmed in Pennell, supra, and Florida Power Corp., supra, this doctrine applies to rent control and other economic regulation of real property, just as to regulation of prices of personal

property and services. Where the legislature has made a determination that economic conditions, such a housing shortage or monopolization of the market, make renters vulnerable to excessive demands for rents or fees, the Court has uniformly upheld governmental regulation of rents. Pennell, supra; Florida Power Corp., supra; Bowles v. Willingham, 321 U.S. 503 (1944); Block v. Hirsh, 256 U.S. 135 (1921). The Court has similarly upheld regulation limiting the power of property owners to terminate rental agreements or to refuse to re-rent where such regulation is an integral element of the legislatively chosen economic and regulatory policy. Block v. Hirsh, supra; Marcus Borwn Holding Co. v. Feldman, 256 U.S. 170 (1921), cf. Fresh Pond Shopping Center v. Callahan, 464 U.S. 875 (1983)

(dismissing for want of federal question appeal challenging termination provisions of municipal rent regulation as violating the Takings Clause).

As set forth above, regulation of the rents of pad in mobile home parks, prohibiting termination of rental agreements without good cause, and requiring park owners to rent to purchasers of mobile homes already in the park are all part of carefully balanced and tailored regulatory strategy designed to advance legitimate legislative purposes. As such, they are satisfy the requirements of the Due Process Clause.

C. The Combination of State and Local Regulation of Mobile Homes Is Not an Unconstitutional Regulatory Taking Without Just Compensation.

The petitioners alternatively cast their substantive due process arguments as a claim that the challenged combination of state and local regulations is an unconstitutional regulatory taking without just compensation. Citing Nollan v. California Coastal Commission, 483 U.S. 825 (1987), they suggest if the same arguments are asserted under this alternative label, the standard of review is more stringent: the regulation must not merely be rationally related to a legitimate governmental purpose but must "substantially advance" that purpose.

This analysis is unsound as a matter of law. The enhanced standard of

review enunciated in Nollan does not apply to generic claims of regulatory taking. It applies rather to instances where government seeks to accomplish a physical taking that would otherwise be a per se violation of the Takings Clause, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), but seeks to do so indirectly--not by seizing the property interest outright, but conditioning receipt of some benefit, such a approval for certain types of development, upon the property owner "voluntarily" ceding the property interest. As a threshold question, the courts must determine whether the condition has some public policy justification, whether it "substantially advances a legitimate state interest." Nollan, 483 U.S. at 434-36.

Expanding this enhanced standard of review to encompass generic claims of regulatory taking is inconsistent with sound principles of federalism and separation of powers. Nearly any claim that economic regulations violate substantive due process can be recast as a claim of regulatory taking. The courts, however, have no more competence or authority to review the wisdom or efficacy of governmental economic and regulatory policies when those policies are challenged under the rubric of "regulatory taking" than when they are attacked under the rubric of "substantive due process." The principles of federalism and separation of powers that counsel deference to legislative judgment where claims are made under the Due Process Clause counsel the same deference when the

identical claims are made under the Takings Clause.

This Court has consistently held that economic regulation of landlord tenant relationships is not a per se taking, even when it diminishes the profit or freedom of choice of the property owner. Pennell, 485 U.S. at 12n. 6; Florida Power Corp., 480 U.S. at 250-53; Loretto, 458 U.S. at 440. Except where the regulation effects a physical taking of the property,[9] the Takings Clause requires only that the regulation not deprive the property owner of a reasonable economic return in light of all the relevant circumstances. Florida Power Corp., 480 U.S. at 253-54; Permian Area Basin Cases, 390 U.S. 747,

9. As discussed below, this regulation does not effect a physical taking of petitioners' property.

768-69 (1968). It imposes no heightened standard of judicial review of the wisdom or efficacy of the regulation.[10]

The petitioners do not claim that the combination of state and local regulation challenged in this proceeding deny them a reasonable economic return on their property. They claim merely that they are not being permitted to realize the value potentially added to their property by the very regulations they are attacking. They contend that the combination of rent regulation without vacancy decontrol and the statute forbidding park operators from refusing to re-rent a pad to the purchasers of the mobile home selected by

10. To the extent that dictum in Nollan suggests otherwise, 483 U.S. at 834n. 3, the Department urges Court not to follow that dictum.

the current owner increases the resale value of mobile homes that are located on pads in regulated parks.[11] They complain that their property has been taken because any such windfall accrues to the mobile home owner not to the park operator.

As the Court of Appeals noted in Pinewood Estates, there is no logical reason to believe that the park owners are any worse off under this combination of state and local regulation than they would be under a pure rent control ordinance, i.e., without vacancy decontrol

11. Since this case was dismissed by the trial court on demurrer, the Court must assume for purposes of this appeal that this is so. It is not self-evident, however, that the rent control has an impact on mobile home resale prices different in kind or magnitude from other public policies, such as exclusionary zoning, legitimation of closed parks, or variation among municipalities in the level of service fees in lieu of taxes.

and without restrictions on their power to evict or to refuse to re-rent to purchasers of existing mobile homes. In that case, they they could freely evict mobile home owners, force the owners to remove their homes, and rent to other mobile homeowners chosen by the park operator at the regulated rent levels. There would be no windfall, even under petitioners' analysis, and petitioners would have no claim under the Takings Clause. 898 F.2d at 353n. 10. The mobile home owner might be worse off, but the park owner would be no better off.[12]

12. The petitioners challenge the combination of the state statute regulating rerental of to purchasers of mobile homes and the absence of vacancy decontrol in the local rent regulations. Obviously they would prefer the remedy of institution of vacancy decontrol by the municipality. They are not, however,

(Footnote continues on next page)

As this scenario illustrates, the purported windfall petitioners claim to be deprived of is over and above the reasonable economic return to which they are entitled. It can give rise to no legitimate claim of regulatory taking.

Moreover, the challenged provisions clearly satisfy the Nollan standard. The Court emphasized in Nollan that

> Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a

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(Footnote continued from previous page) entitled to this remedy, even if they prevail. The state and local legislative bodies could choose to preserve the local rent regulations intact and repeal or modify the state regulatory statute.

> broad range of governmental purposes and regulations satisfies these requirements. [483 U.S. at 834-35 (footnote and citations omitted)]

As illuminated by the legislative history of the identical regulations in New Jersey, the regulations challenged here, taken in the context of the state regulatory strategy as a whole, are carefully tailored to balance a complex set of legitimate governmental purposes. Even if the regulations seem to achieve none of these purposes perfectly when viewed in isolation, when considered together they contribute substantially to the accomplishment of the entire set of governmental purposes. Since they substantially advance legitimate state interests and do not deprive petitioners of a fair economic return, they do not constitute an unconstitutional regulatory taking.

In sum, the challenged regulations do not violate consitutional principles of substantive due process and are not unconstitutional regulatory takings.

POINT II

THE COMBINATION OF STATE AND LOCAL REGULATION OF MOBILE HOME PARKS DOES NOT CONSTITUTE AN IMPERMISSIBLE PHYSICAL TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE TAKINGS CLAUSE.

Petitioners' contention the challenged regulations constitute an unconstitutional physical taking centers on the state statute that forbids mobile home park operators from refusing without just cause to rent pads to purchasers of mobile homes currently in the park. Petitioners contend that this permits third parties to occupy their property involuntarily in violation of

the Takings Clause as construed in Loretto, supra.

This analysis is unsound as a matter of law. Property owners who operate mobile home parks do so for the purpose of renting pads to third parties. They voluntarily elect to permit third parties to occupy their property. They need not do so. They can take pads off the market and occupy the property themselves or use it for some other purpose.[13] When state law forbids a

13. In this respect this case is different from Fresh Pond Shopping Center, supra. In that case, the Court held that a challenge under the Takings Clause to a municipal rent control ordinance that prohibited evictions except for cause and prohibited the property owner from taking the property off the rental market and using it for some other purpose so long as any of the tenants continued to reside in the building raised no substantial federal question. In the present case, neither state nor local regulation denies the

(Footnote continues on next page)

park owner from refusing to re-rent to the purchaser of a mobile home in the park except for just cause, it is not forcing the property open his property involuntarily to third parties. He has

---

(Footnote continued from previous page) park operator of the right to take his property out of use as a mobile home park and put it some other use.

Amicus curiae Manufactured Housing Association in New Jersey, Inc. suggests that, at least in New Jersey, mobile home park operators do not actually have the option of turning his property to some other use. It contends that municipalities have zoned, or would zone, existing mobile home parks for use solely as mobile home parks, leaving park operators with no other option. As documented at length by New Jersey Mobile home Study Commission, the reality is that, far from mandating that property be used for mobile home parks, few municipalities in the state even permit its use for that purpose. Mobile Home Report, supra at 92-103. Many existing parks are non-conforming or conditionally permitted uses. Id. at 103n.**. Municipalities are, if anything, all too eager to have them converted to other uses. Thus, this suggestion has no basis in reality.

already elected to do so. The government is merely placing reasonable restrictions upon his choice of third parties.

This Court has previously upheld state laws that restrict the choice of property owner as to which third parties he will permit to occupy his property against claims under the Takings Clause, both in the context of rent regulation, Block v. Hirsh, supra, and in other contexts, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Heart of Atlanta Motel v. United States, 379 U.S. 241, 259-60 (1964). As the Court observed in Florida Power Corp., it is the element of "required acquiesence" to the occupation by a third party that is the essence of an impermissible physical taking. 480 U.S. at 252.

The importance of this element is illustrated by Loretto and Florida Power Corp. In the former case, the government granted a cable company the right to put cable lines on the roof an apartment building, over the owner's objections. The Court struck that down as an impermissible physical taking. In the latter case, the power company offered to rent space for cable lines on its poles, but the government set a rent level much lower than that demanded by the power company. The Court upheld this regulation. [14]

> Appellees contend, in essence, that it is a taking under Loretto for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. [Florida Power Corp., 480 U.S. at 252]

14. Because the government regulations in Florida Power Corp did not require the power company to renew or accept assignment of rental agreements, the Court did not have occasion to comment on the significance of its analysis to that issue. Florida Power Corp., 480 U.S. at 251n. 6.

The purported additional profit that this regulatory scheme permits the seller of a mobile home to reap adds nothing to this analysis. As discussed above, this additional profit is solely the consequence of the regulatory scheme itself. If petitioners prevail and the regulatory scheme is struck down, the purported additional profit does not fall to the park operator; it simply disappears. That the park operator's tenant might make an additional profit from the regulatory scheme does not deprive the park operator of anything that is rightfully his.

The Takings Clause is ultimately concerned with preventing government

"from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 318-19 (1987). As documented in the history of the New Jersey regulations, mobile home park owners have been the beneficiaries of public policies that have given them a degree of monopoly power and enabled them to charge extraordinary rents and demand extraordinary fees to the detriment of the public. The complex body of state and local regulation adopted by California and New Jersey is designed to foster the availability of mobile homes and mobile home parks as affordable housing while depriving park operators

of the opportunity obtain these excessive rents and fees. It is not making them bear any exceptional burden, merely restricting them to the profits they could make if economic markets functioned more freely and normally. As Justice Scalia observed in Pennell:

> When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs. Whether or not that is an accurate perception of the way a free market operates, its is at least true that the owners reap unique benefits from the situation that produces the economic hardship, and in that respect singling them out to relieve it may not be regarded as "unfair." [485 U.S. at 20 (Scalia, J., dissenting)]

As illuminated by legislative history in New Jersey, just such considerations motivated regulations challenged here.

CONCLUSION

For all the foregoing reasons, the Public Advocate respectfully urges this Court to affirm the decision of the California Court of Appeals.

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No. 90-1947

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE, *et al.*,
Petitioners

v.

THE CITY OF ESCONDIDO,
Respondent

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether the Court of Appeal was correct in ruling that the City of Escondido's Mobilehome Rent Protection Ordinance did not constitute a taking without just compensation even though it restricts a mobile home park operator's ability to increase space rent whenever a mobile home is transferred from one homeowner to another.

(2) Whether the Escondido Ordinance substantially advances a legitimate state purpose and does not deny mobile home park operators economically viable use of their land even though it restricts a park operator's ability to increase space rent whenever a mobile home is transferred from one homeowner to another.

(3) Whether the Court of Appeal was correct in ruling that the Escondido Ordinance is not a violation of federal substantive due process even though it restricts a park operator's ability to increase space rent whenever a mobile home is transferred from one homeowner to another.

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Court of Appeal for the State of California**

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The American Association of Retired Persons ("AARP") is a not-for-profit membership organization of 33 million persons, age 50 and over. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity and purpose; (c) lead in determining the role and place of older persons in society; and (d) sponsor research on physical, psychological, social, economic and other aspects of aging. AARP meets its members' diverse needs by providing a range of services including educational programs, informative publications, opportunities for volunteer service, special member bene-

fits, as well as representation of the concerns of older Americans before legislative, administrative and, where appropriate, judicial bodies.

Mobile homes are a major source of housing for older Americans. More than one million older Americans (age 65 and over) are residents of mobile home parks.[1] In California, 72% of mobile home residents are age 55 or older,[2] and the majority of residents of the mobile home parks in this case are older persons.

AARP stands as a representative of these older citizens, many of whom have limited financial resources.[3] For them, mobile homes are one of the few remaining sources of affordable home ownership. Moreover, many older residents of mobile home parks are very old,[4] and live alone.[5] The mobile home constitutes their only significant accumulated asset. A severe shortage of rental sites in many communities, combined with the immobility of "mobile homes",[6] gives park operators extraordinary leverage to exact large increases in rent and other fees. The combination of limited resources and increased medical costs associated with aging places older mobile home park residents in a particularly vulnerable position.

States and localities have recognized the unique nature of the mobile home tenancy and have enacted laws and ordinances, like the one at issue in this case, that strike the proper balance between the interests of mobile home owners and those of mobile home park operators. Courts have long upheld rent control as a reasonable means of protecting tenants and of ensuring an adequate stock of affordable housing. AARP strongly supports the authority of states and localities to enact rent control laws and ordinances, authority which is being challenged in this case. The Association submits this brief *amicus curiae*, with the consent of the parties,[7] urging this Court to affirm the decision of the California Court of Appeal.

[1] U.S. Department of Commerce and U.S. Department of Housing and Urban Development, *American Housing Survey for the United States in 1989* 326, Table 7.9 (1991). This survey defines "elderly householder" as age 65 or older. It also collects information on all mobile homes, whether they are situated in mobile home parks or on land owned by the homeowner.

The percentage of older persons who are new buyers of mobile homes continues to increase. The percentage of new buyers age 60 and over increased from 15 to 19 percent between 1984 and 1987. American Association of Retired Persons, *Manufactured Housing Park Tenants: Shifting the Balance of Power* i (1991).

[2] California Department of Housing and Community Development. *Mobile Home Parks in California—A Survey of Mobile Home Park Owners Pursuant to S.B. 1835* (Craven; Chapter 580, Statutes of 1984) 1, 30, Table 15 (1986).

[3] The most recent American Housing Survey indicates that 43% of older residents of mobile homes have annual incomes below $10,000, and nearly 80% have annual incomes below $20,000, *1989 American Housing Survey, supra* note 1, at 334, Table 7-12.

[4] Approximately 40% of older residents of mobile homes are age 75 and older. *1989 American Housing Survey, supra* note 1, at 326, Table 7.9.

[5] Nearly half (46%) of the older residents of mobile homes live alone, and most of these residents are widows. *Id.*

STATEMENT OF THE CASE

AARP adopts the respondent's statement.

[6] As discussed *infra* note 17 and accompanying text, mobile homes are rarely "mobile" today, given the high cost of moving them, the potential for damage, and the limited number of available mobile home "pads." As is true for other types of housing, the length of tenure for older residents of mobile homes is longer than that for younger residents. According to the 1989 Housing Survey, nearly half (49%) of older mobile home residents moved into their homes before 1980, compared to 26% of younger residents (under 65 years of age). *1989 American Housing, supra* note 1, at 328 (Table 7-9) and 52 (Table 2-9).

[7] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

Under all applicable standards, the Escondido Rent Control Ordinance does not violate any rights of the petitioners under the Fifth and Fourteenth Amendments of the Constitution. The California Court of Appeal was correct in holding that the "per-se taking" standard established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), is not applicable to this case. First, the interests that allegedly are being "taken" by operation of the Ordinance are not recognized by law as "property rights." Second, any restrictions on mobile home operators' property rights result from operation of the state mobile home law and not the local Ordinance. Moreover, the limitations on the landlord's ability to terminate a mobile home tenancy resulting from the California Mobilehome Residency Law are constitutionally permissible. Third, the Escondido Ordinance, and the state law, do not compel the petitioners to acquiesce to the "permanent physical occupation" required by the *Loretto* standard.

Since this case challenges the constitutionality of rent control, which is a form of economic regulation, the "multifactor inquiry" established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), is the appropriate standard to apply in a takings analysis. The Escondido Ordinance does not result in a taking requiring just compensation under the *Penn Central* standard because the character of the governmental action in this case, and the significance of the problems it reasonably attempts to address, clearly outweigh any economic impact on the petitioners. The public purpose behind the Escondido Ordinance—to protect mobile home tenants—has consistently been recognized as legitimate. Moreover, there is a rational relationship between this purpose and the Escondido Ordinance, which attempts to more fairly balance the interests of landlords and tenants in the mobile home market. At the same time, any economic

impact on the petitioners is not the "drastic" diminution in value required by courts to find a taking under this standard.

If this Court chooses to apply a stricter standard in its takings analysis, then AARP maintains that the Escondido Ordinance "substantially advances a legitimate government interest" and, at the same time, does not deny mobile home park operators "economically viable" use of their property. The Ordinance not only protects subsequent tenants from exorbitant rents, but also clearly protects current tenants from the significant loss in the value of their mobile homes that would result from such rent increases. Moreover, the vacancy control provision, which is being challenged in this case, can be considered as a type of eviction protection, by eliminating the incentive of park operators to pressure existing tenants to move so that they can raise rents. Clearly, all of these interests are "substantially advanced" by the Escondido Ordinance. At the same time, the petitioners are still able to rent their property and receive income from it; their use of the property remains economically viable.

Finally, the Escondido Ordinance does not violate the substantive due process rights of mobile home park operators. Legislation survives a due process challenge if the Court finds that the legislature reasonably could have concluded that its action would promote a legitimate state interest. The fundamental question in a substantive due process analysis of the Ordinance is not the wisdom of it, but rather, its reasonableness, which is clearly evident in this case.

ARGUMENT

I. THE LOWER COURT WAS CORRECT IN HOLDING THAT THE ESCONDIDO ORDINANCE DOES NOT CONSTITUTE A TAKING OF THE PETITIONERS' PROPERTY WITHOUT JUST COMPENSATION

The Association will rely on the respondent and other *amici* to more fully argue that the California Court of Appeal was correct in rejecting the application of the standard established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) to this case. This *amicus* brief addresses this argument in a general manner, and only highlights a number of relevant points that the Court should consider in its deliberations. This brief focuses primarily on the important public purpose behind the Escondido Ordinance, as explained in the context of the takings analysis established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

A. The Escondido Ordinance Does Not Result In A Taking By Permanent Physical Occupation And Thus Does Not Fall Within The Standard Adopted In *Loretto v. Manhattan Teleprompter*

The petitioners' argue that, because the Escondido Ordinance resulted in a "permanent physical occupation" of their mobile home park sites by mobile home owners not of their choosing, it constitutes a "per-se taking" under the *Loretto* standard.

The court below was correct in refusing to apply the *Loretto* standard to this case. The Escondido Ordinance merely regulates the economic relations of landlords and tenants, and, as this Court has consistently stated, such statutes (as well as ordinance) are not "*per se* takings." *Pennell v. City of San Jose*, 458 U.S. 1, 12, n.6 (1988).

The *Loretto* standard is not applicable to this case for a number of reasons. First, the interests that allegedly are being "taken" by operation of the Escondido Ordinance are not property rights recognized by law. In *Loretto* and subsequent decisions, this Court has emphasized that a taking will be found under *Loretto* only where recognized property rights—"treasured strands in an owner's bundle of property rights"—are involved. *Loretto v. Teleprompter*, 458 U.S. at 435.

The petitioners argue that the Escondido Ordinance, "either standing alone or in combination with" the California Mobilehome Residency Law, transfers valuable rights from park operators to homeowners. However, the impact of the state law must be separated from that of the Ordinance in order to properly analyze the petitioners' takings argument. When one untangles the bundle of five rights that the petitioners claim are being "taken" by operation of the Ordinance,[8] one can clearly see that the only two "rights" that are affected by the Ordinance are in fact not recognized by law as "property rights."

These rights—the right to "pay rent below market in perpetuity" (right #2) and the right "to fix the successor tenant's effective rent by charging a premium on the sale of the mobilehome coach" (right #4)—are not "sufficienty bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes." *Penn Central v. New York*, 438 U.S. at 125. The "right" to collect a certain rent and the "right" to receive any "premium" on the sale of a mobile home clearly are not included in "the group of rights inhering in a citizen's relation to the physical thing." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

The petitioners in this case have no property interest in any "additional rents" that could be collected in the absence of the Ordinance. Nor is the "premium" resulting from the sale of the mobilehome in their rent-controlled park—the "site value"—a discrete property interest belonging to the park operator.[9]

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[8] *See* Brief for Petitioners at 6.

[9] The court below correctly suggested that the "sales premium," rather than representing the "value" of an interest transferred by

Second, the remaining rights outlined by petitioners—the right to "occupy the mobilehome space in perpetuity" (right #1); the right to "select the next tenant to occupy the property" (right #3); and the right to "sell, bequeath, or pass by intestacy all of these rights" (right #5)—are all affected not by the Escondido Ordinance, but by the California Mobilehome Residency Law. The relevant statutory provisicns[10] do not grant mobile home owners the "right" to remain in the park "in perpetuity," but rather, simply limit the grounds for eviction to those based on "just cause." Such limitations have generally been upheld by the courts. *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 688 P2d. 894, 900 (1984). *See also Eamiello v. Liberty Sales*, 208 Conn. at 641 ("the modification of the common law right of the lessor to absolute control over the term of the lease and the identity of his lessee

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operation of the Escondido Ordinance, may simply reflect the artificially low price of mobile homes caused by excessive rents charged prior to enactment of the ordinance. *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1357 (1990). *See also Casella v. City of Morgan Hill*, 230 Cal. App. 3d 43, 54 (1991); *Eamiello v. Liberty Mobile Home Sales*, 208 Conn. 620, 649 (1988) ("In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle.")

Even assuming that there was any increased "value" residing in the tenant as a result of the Ordinance, this increase reflects an increase in the value of the "leasehold" which, under California law, is usually considered the property of the tenant, not the landlord. *See Kendall v. Pestana*, 40 Cal. 3d 488 (1985); 4 H. Miller & M. Starr, *Current Law of Cal. Real Estate* 27:92 (1977 & Supp. 1984).

[10] Among other protections and requirements, the California Mobilehome Residency Law prohibits park operators from: (1) terminating tenancies without specified cause; (2) requiring removal of mobile home coaches when tenancies end; and (3) disapproving incoming tenants who purchase mobilehomes, so long as the purchasers are creditworthy and unlikely to violate park rules. Cal. Civ. Code §§ 798.55, 798.73, 798.74 (West 1991).

. . . in respect to mobile home parks is not sufficiently analogous to a physical occupation of property to violate the takings clause.")[11]

Clearly, the state law restricts a mobile home park operator's right to exercise his sole discretion in the selection of his tenants. However, this restriction is not enough to constitute a taking. The type of "taking" necessary to invoke the per-se standard is not one where a "single strand" from the bundle of property rights is taken, but rather, the government action "chops through the bundle, taking a slice of every strand." *Loretto v. Teleprompter*, 458 U.S. at 435. That is not the case here because, for the most part, the operator still controls the extent and nature of the possession; most importantly, he retains his primary interest in his land—the right to receive income.

Finally, this Court's decision in *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245 (1987), makes clear that the "per-se taking" standard established in *Loretto* is inapplicable to this case. In *Florida Power*, the Court clarified that the element of "required acquiescence" is at the heart of the "physical occupation" that triggers a "per-se taking." The appellees in *Florida Power* contended that it was a taking under *Loretto* for a tenant who was invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. This Court rejected this contention, noting that what made the circumstances in *Florida Power* different from those in *Loretto* was the "invitation." *FCC v. Florida Power*, 480 U.S. at 252.

Similarly, there can be no "per-se taking" in this case, just because the park operator, after inviting a home-

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[11] Indeed, in the recent decision in *Azul Pacifico, Inc. v. City of Los Angeles*, 91 Daily Journal D.A.R. 13599 (9th Cir., Nov. 5, 1991), the Ninth Circuit acknowledged the "apparent" constitutionality of provisions that allow mobile homeowners to sell their homes on site, that require park operators to renew leases, and that "sharply" circumscribe the park operator's ability to terminate leases. *Id.* at 13600.

owner to rent space in his park at a particular rent, receives a lower rent as a result of the Escondido Ordinance, and that same rent is then paid by the subsequent purchaser of the mobile home. The fact that this rent is paid by someone other than the original tenant is of no constitutional significance.[12]

B. The Escondido Ordinance Is Not A Taking Under The Standard Adopted In *Penn Central v. New York*

The California Court of Appeal was correct in rejecting the *Loretto* standard in this case. What is being challenged here is rent control, a form of economic regulation, not a governmental action resulting in a "permanent physical occupation." As this Court noted in *Loretto v. Teleprompter*, economic regulations like the Escondido Ordinance should be analyzed under the multifactor inquiry applicable to "nonpossessory" governmental activity. *Loretto v. Teleprompter*, 458 U.S. at 440.

A takings analysis "necessarily requires a weighing of private and public interests." *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980). As this Court has recognized, "government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic

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[12] By alleging that they are being compelled to rent their property to tenants whom they did not choose, the petitioners are essentially claiming that their "right to exclude" has been "taken." A similar argument was made in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). This Court's response in that case, where property was being held out to the public, is equally applicable here, where property is being held out for tenants: the right to exclude others is not "so essential to the use or economic value of their property that the state-authorized limitation of it amounts to a 'taking'." *Id.* at 84. *See also Marsh v. Alabama*, 326 U.S. 501, 506 (1946) ("Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.")

exploitation of private property." *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

The decision in *Penn Central v. New York* suggested some factors to consider in a multifactor inquiry: "the economic impact of the regulation on the claimant"; "the extent to which the regulation has interfered with distinct investment-backed expectations"; and "the character of the governmental action." 438 U.S. at 124.

In analyzing these factors, it is essential to put the inquiry in the proper context. As this Court noted in the *Penn Central* case:

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in the particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights *in the parcel as a whole* . . .

Id. at 130-31 (emphasis added).

AARP strongly believes that after weighing and balancing the factors discussed above, this Court will find that the Escondido Ordinance has not resulted in a taking requiring just compensation.[13] The character of the governmental action in this case, and the significance of the problems it attempts to address, outweigh any economic impact on the petitioners.

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[13] AARP agrees with the respondent that the petitioners should be precluded from arguing in this Court that the Ordinance establishes a taking under the *Penn Central* standard. Because the petitioners failed to seek just compensation under available state remedies, an "as applied" taking claim under this standard is plainly unripe. Moreover, because petitioners did not raise or litigate a "facial" claim under the *Penn Central* standard below, they cannot now rely on such a claim as a grounds for reversal. However, AARP analyzes the Escondido Ordinance under the *Penn Central* standard, if the Court decides to consider this argument.

1. *The Escondido Ordinance is a rational approach to remedying imperfections in the mobile home market*

An examination of the "character of the governmental action" is totally missing from the petitioners' brief. They dismiss the Escondido Ordinance with a single conclusion: "the character of the governmental action . . . cuts across the property owner's right to use, possess and dispose of his property." Brief for Petitioners at 18.

Consideration of the public purpose behind the Escondido Ordinance, and of its relationship to the Ordinance, reveals that the Ordinance is the type of governmental action that has consistently been upheld by courts. This Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Central v. New York*, 438 U.S. at 125. As the Court noted in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413.

This same sentiment has been expressed regarding the regulation of landlord-tenant relations and housing conditions: this Court has "consistently affirmed that States have *broad* power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter*, 458 U.S. at 440 (emphasis added); *Pennell v. San Jose*, 485 U.S. at 11-12.

The Escondido Ordinance is representative of the type of reasonable responses that state and local governments have taken to remedy the imbalance in the relationship of landlords (mobile home park operators) and tenants

(mobile homeowners) in the mobile home market and, thereby, ensure the availability of this affordable type of home ownership.

For millions of Americans with limited resources, many of whom are older citizens,[14] "mobile homes", with a median purchase price of approximately $15,000,[15] are one of the few remaining sources of affordable home ownership.[16]

The term "mobile home" is a misnomer, since most of these homes make only one trip—from the factory or showroom to the installation site.[17] Mobile homeowners are not "tenants" who can just pack their bags and leave when a dispute arises with a park operator. Once installed, these homes cost an estimated $10,000 to $15,000

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[14] As noted *supra* note 3, older residents of mobile homes tend to have limited financial resources. This is true even when compared to other mobile home residents. The median income of older mobile home households (age 65 and older) was $11,556 in 1989—58% less than the median national income ($27,735) and 38% less than the median income of younger (less than 65 years old) mobile home residents ($18,758) *1989 American Housing Survey, supra* note 1, 324 (Table 7-12), 58 (Table 2-12).

[15] *1989 American Housing Survey, supra* note 1, at 342 (Table 7-14). The median value of a mobile home is $18,563. *Id.*

[16] In his 1970 message to Congress on national housing goals, President Nixon acknowledged that "for many moderate-income American families, the mobile home is the only kind of housing they can reasonably afford." *Message from the President of the United States Transmitting the Second Annual Report on National Housing Goals*, Committee on Banking and Currency (April 1, 1971). *See also Report on the President's Commission on Housing* 85-86 (1982).

[17] The fact that, today, mobile homes are designed to be permanent structures has led the industry and the government (the Department of Housing and Urban Development) to refer to this type of dwelling as "manufactured" housing.

to move, and the homes can suffer serious damage in the moving process.[18]

Over half of all mobile homeowners (54%) rent the sites on which their homes are installed.[19] A severe shortage of rental sites in many communities, created by restrictive zoning, combined with the immobility of "mobile" homes, gives park operators extraordinary leverage to exact large increases in rents and other fees. According to a 1987 survey, mobile home park rents increased from an average of $93 per month in 1981, to $121 in 1984 and $138 per month in 1987. Seventeen percent of park residents in the same survey reported paying $200 or more in rent per month, up from ten percent reporting in a similar 1984 survey.[20] In Florida, for example, from 1986 to 1991, apartment rents rose 15 percent, the Consumer Price Index (CPI) moved up 23 percent and commercial rents declined, while mobile home park rents increased 62 percent.[21]

The Maryland Court of Appeals discussed the situation in the mobile home market more than a decade ago, when it upheld that state's mobile home law against a takings challenge:

> Despite the rising popularity of relatively low cost mobile homes, many communities have enacted zoning regulations which exclude them entirely or severely limit the areas where they may be placed, frequently restricting them to mobile home parks. Thus, the mobile home owner is compelled to rent space from the park owners who, because of the limited ability of space and the high cost of relocation, are able to dictate unfavorable rental terms and conditions.

Cider Barrel Mobile Home Court v. Eader, 287 Md. 571, 574 (1980).

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[18] *Shifting the Balance, supra* note 1, at i.

[19] *Id.*

[20] *Id.*

[21] Kullman, *David vs. Goliath*, FMO News 4 (March 1991).

In addition to escalating rents, many mobile home residents have been victimized by a variety of unfair practices that arise from the unique combination of home ownership and site tenancy. These include tie-ins between home sales and park rentals, unfair restrictions on the sale or transfer of the home or tenancy, evictions without good cause, excessive and unreasonable fees, unreasonable park rules and regulations, harassment of tenant organizations and retaliatory evictions, as well as failure to maintain parks.[22]

In order to protect tenants, some 32 states have enacted specialized legislation regulating mobile home park tenancies. California, Florida, and New York have enacted extensive laws that include provisions that prohibit tie-ins between the sale of homes and the renting of park sites as well as entrance and exit fees, provide a warrant of habitability requiring the park operator to maintain the park in a habitable condition, and give residents a right of first refusal, providing an opportunity for them to purchase the park before it is sold to another party. Additionally, requirements for long-term leases consider the homeowner's investment in installing a home.

In upholding its state's mobile home statute, the Connecticut Supreme Court in the *Eamiello* case recognized the unique nature of a mobile home tenancy and the investment made by mobile home owners. It found that the statutory provision prohibiting a mobile home park operator from restricting the homeowner's right to sell "protects tenants at mobile home parks from being forced to sell to park owners at a substantial loss and as a consequence benefits many low income people who cannot otherwise afford to purchase more expensive housing." *Eamiello v. Liberty Sales*, 208 Conn. at 648.

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[22] *Shifting the Balance, supra* note 1, at ii.

The issue of rent control for mobile home tenancies is one that has generally been addressed at the local level.[23] Like many other communities in California and across the country, Escondido began to struggle in the early 1980's with how best to respond to escalating rents for mobile home spaces. After a series of attempted accords, propositions, and hearings throughout the decade, the city ratified the Ordinance in question in June 1988.

The "modified rent stabilization" approach followed in the Ordinance "offers relief for current renters without harsh constraints on the park owners," provides a "reasonable return on investment for the park owners," and allows "reasonable rent increases based on certain criteria." [24]

In addition to Escondido, numerous other communities in California, as well as those in other states, have enacted rent control ordinances for mobile home tenancies,[25] many of which include vacancy control provisions.

2. *The economic impact of the Escondido Ordinance is not severe*

As one commentator has noted, to find a taking under the *Penn Central* test, this Court has "made it clear that the economic or other interference must be nearly total." [26] Similarly, the Ninth Circuit in *Hall v. City of*

[23] At least one state statute addresses rental rates. *See* Fla. Stat. Ann. § 723.033 (West Supp. 1991) (law prohibits "unconscionable" rent increases).

[24] D. Thurston, An Issue Paper on Rent Stabilization for Mobile Home Parks (Oct. 15, 1986).

[25] According to one source, over 75 communities in California had mobile home space rent controls in 1988. Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 406-407 (1988).

[26] Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 958 & n.190 (1989).

Santa Barbara, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), in discussing the *Penn Central* case, noted that economic regulation cases can withstand drastic diminution in the value and usefulness of property. *Hall v. Santa Barbara*, 833 F.2d at 1275. The economic impact alleged by the petitioners in this case could not reasonably be characterized as "drastic" or "nearly total."

Moreover, it is incorrect for the petitioner to quantify the "economic impact" of the Ordinance in terms of the premium received by a homeowner on the sale of his mobile home in a rent-controlled park.[27] One commentator correctly suggests that "courts ought to focus on the property owner's loss rather than the occupier's gain." [28] The petitioners' loss is speculative, at best. As the Third Circuit acknowledged in *Pinewood Estates of Michigan v. Barnegat Township*, 898 F.2d 347 (3rd Cir. 1990), it could be argued that the mobile home park operators might, in fact, receive the same rents they are currently receiving in the absence of vacancy control. *Id.* at 353, n.10.

3. *The Escondido Ordinance does not seriously interfere with distinct investment-backed expectations*

The petitioners clearly expected to obtain a greater "profit" from their mobile home parks than they are currently receiving. This, however, is not the type of ex-

[27] AARP maintains, as discussed above, that the allegedly taken property rights—measured as this "premium" and/or any "additional rents"—never belonged to the petitioners in the first place. As this Court noted in the *Penn Central* case, while governmental action may cause economic harm, a taking will not be found where that action has not interfered with a property interest. *Penn Central v. New York*, 438 U.S. at 124-25.

[28] Manheim, *supra* note 26, at 1012 and n.523. Manheim notes that this parallels the analysis in condemnation proceedings.

pectation that the courts should recognize in a takings analysis. The fact that the most profitable use of property is prevented is not dispositive. *Andrus v. Allard*, 444 U.S. 51, 66.

Through operation of the Ordinance, the petitioners are still able to rent their property and receive an income from it; their expectancy of rental use has not been fundamentally disturbed and remains economically viable. Petitioners continue to receive a fair return on their investment. This is all that they are entitled to receive under the law. *See Pennell v. San Jose*, 485 U.S. at 13. If the park owners do not believe that they are receiving a fair return then, just as many other park operators have already done, they can petition the Escondido Mobilehome Park Rental Review Board to obtain a rent increase.

It is clear from the foregoing discussion that the Escondido Ordinance is an important, rational, and constitutional exercise of the city's police power, which "strikes a reasonably fair balance between the economic interest of mobile home tenants and those of mobile home park operators." *Eamiello v. Liberty Sales*, 208 Conn. at 649-650. Therefore, in balancing the nature of the Ordinance against the other factors of the *Penn Central* standard, this Court should determine that no takings claim can be made.

II. THE ESCONDIDO ORDINANCE SUBSTANTIALLY ADVANCES LEGITIMATE STATE INTERESTS AND DOES NOT DENY PETITIONERS ECONOMICALLY VIABLE USE OF THEIR LAND

The petitioners suggest that the Escondido Ordinance should be analyzed under the stricter standard for takings analyses outlined by the Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). We agree with the California Court of Appeal, which questioned the applicability of *Nollan*'s "heightened scrutiny"

to rent control provisions. *See Casella v. Morgan Hill*, 230 Cal. App. 3d at 56.

AARP maintains that, if a stricter scrutiny approach is adopted, then it should be limited to land use cases like *Nollan*. If, however, the Court chooses to apply the *Nollan* standard to this case, then the Escondido Ordinance would be able to satisfy this test.

The petitioners contend that the Escondido Ordinance does not substantially advance a legitimate state purpose but, rather, "simply enriche[s] those residents who were in place when the voters enacted rent control." Brief for Petitioners at i. AARP rejects this narrow characterization of the Ordinance's purposes. *See Miller v. Schoene*, 276 U.S. 272, 279 (1928) (that certain private interest may benefit from the restrictions placed upon the property of others does not establish that those restrictions are not in the public interest); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243-244 (1984) (the fact that the immediate beneficiaries of a governmental action may be individual tenants "does not condemn it as having only a private purpose.")

Clearly, the Escondido Ordinance, in particular its vacancy control provision, protects existing mobile home owners. If there was no vacancy control, then the park operator could threaten to raise rents so high as to significantly depress the value of mobile homes in his park.

Moreover, the vacancy control provision can be considered to be a type of eviction protection. Without vacancy control, a landlord has the incentive to harass the existing tenant to the point of forcing the tenant to move out so that the landlord can increase the rent. In *Pennell v. San Jose*, this Court recognized as a legitimate purpose of a rent control statute reduction of "the costs of dislocation that might otherwise result if landlords were to charge rents to tenants that they could not afford. Particularly during a housing shortage, costs of the disloca-

tion of low-income tenants can be severe." 485 U.S. at 14, n.8. *See also Schnuck v. City of Santa Monica*, 935 F.2d 171, 175 (9th Cir. 1991) (eviction controls have been upheld to protect "tenants from the high cost of dislocation in a tight housing market, and prevent landlords from arbitrarily evicting tenants simply to obtain higher rents from new tenants.") The threat of eviction is particularly acute for mobile home owners who face the prospect of literally moving their homes at great expense and potential for costly damage.

Of course, vacancy control also protects the purchasers of the mobile homes located in the parks from exorbitant rents. A recent survey reveals that in mobile home parks where there is no vacancy control, rents increased between 50-100 percent upon the sale of the mobile home.[29]

While the Escondido Ordinance "substantially advances" the above-stated purposes, the petitioners are still able to rent their property and receive income from it. As discussed above, their use of the property remains economically viable.

If the Court chooses to apply the stricter *Nollan* standard to this case, then the decision in *Azul Pacifico v. Los Angeles* is instructive. In a challenge to that city's vacancy control provision, the Ninth Circuit acknowledged that it "cannot say that [the vacancy control provision] is unconstitutional" where the vacancy control provision serves the purpose of "protecting existing tenants from being forced to sell their coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach." The court went on to note that this rationale "falls within the traditional police power and thus there is a sufficient nexus between the challenged provision and a legitimate

[29] Golden State Mobile Home Owners League, *Mobilehome Parks with Large Rent Increases for Mobilehome Pads upon Changes of Ownership of Mobilehomes* (1990).

justification." *Azul* at 13602. AARP believes that the same conclusion should be reached in this case.

III. THE ESCONDIDO ORDINANCE IS A REASONABLE MEANS TO ACHIEVE THE STATED GOALS OF THE CITY AND THEREFORE DOES NOT VIOLATE THE PETITIONERS' RIGHT TO DUE PROCESS OF LAW

This Court has long held that due process "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means shall have a real and substantial relationship to the objective sought to be obtained." *Nebbia v. New York*, 291 U.S. 502, 523, 525 (1934).

As this Court recently reaffirmed in *Pennell v. San Jose*, price control, including rent control, is unconstitutional under the Due Process Clause of the Fourteenth Amendment if it is "arbitrary, discriminatory, or *demonstrably irrelevant* to the policy the legislature is free to adopt." 485 U.S. at 11 (emphasis added and citations omitted). Similarly, California courts have upheld controls in the landlord-tenant area as legitimate exercises om the police power, if they are "reasonably calculated to eliminate excessive rents." *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 165 (1976).

There is no real dispute regarding the legitimacy of the public purpose behind rent control. As this Court said in the *Pennell* case, "[a] legitimate and rational goal of price or rate regulation is the protection of consumer welfare" and "a primary purpose of rent control is protection of tenants." 485 U.S. at 13.

The disagreement, however, focuses on the relationship between this valid purpose and the Ordinance. It is important to remember that the fundamental question in a substantive due process analysis is not the wisdom of the Ordinance, but rather, its reasonableness. What this Court

said regarding the San Jose rent control ordinance challenged in the *Pennell* case is equally true here: the Escondido Ordinance "represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Pennell v. San Jose*, 485 U.S. at 13.

Faced with a substantive due process challenge of a mobile home control ordinance, the Ninth Circuit in *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951 (9tn Cir. 1991), had no problem finding it to be constitutional. Noting that the plaintiff has a "heavy burden" to show that "*no* rational relationship exists between the vacancy control provision and the purpose of the ordinance," *id.* at 958 (emphasis added), the court in *Sierra* held that "[a]lthough it may be true that the ordinance in some cases takes money from the landlord and puts it into the pocket of a tenant who no longer resides at the park, the City Council could reasonably believe that in the majority of cases the ordinance serves the valid public purpose of keeping mobile home rent from becoming prohibitively high." *Id.*

The court in *Sierra* went on to note that "[h]ow well the ordinance serves this purpose is a legislative question, one the court will not consider." *Id. See also Casella v. Morgan Hill*, 230 Cal. App. 3d at 57; *Birkenfeld v. Berkeley*, 17 Cal. 3d at 159; *Schnuck v. Santa Monica*, 935 F.2d at 175 ("that rent control may unduly disadvantage others, or that it may exert adverse long-term effects on the housing market, are matters for political argument and resolution; they do not affect the constitutionality of the Rent Control Law."). The City Council and citizens of Escondido should be granted the same deference in this case.

CONCLUSION

In sum, the California Court of Appeal decision is the only outcome that preserves the legitimate authority of states and localities to reasonably balance the interests of mobile home owners and mobile home park operators in an attempt to remedy imperfections in the mobile home market.

For the foregoing reasons, the American Association of Retired Persons respectfully requests this Court to affirm the decision of the California Court of Appeal.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1991

JOHN K. YEE and IRENE S. YEE, et al.,

Petitioners,

vs.

CITY OF ESCONDIDO,

Respondent.

On Writ Of Certiorari To The Fourth Appellate District, Division One, Court Of Appeal For The State Of California

BRIEF *AMICUS CURIAE* OF FLORIDA MANUFACTURED HOUSING ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Florida Manufactured Housing Association, Inc. (hereinafter FMHA) is a Florida not-for-profit corporation organized and maintained for the benefit of approximately 1000 owners of Florida mobile home parks containing a combined total of approximately 300,000 to 350,000 mobile home lots. The owners of the 1000 mobile home parks comprise a substantial portion of the membership of FMHA. One of the primary purposes of FMHA is to act on behalf of its members before the various governmental agencies of the State of Florida to promote the interests of various segments of the manufactured housing industry.

Mobile home parks are heavily regulated in Florida by the "Florida Mobile Home Act." Fla. Stat. Ch. 723. There are rights granted to the purchaser of a mobile home located in a mobile home park. Currently, Florida law provides:

> The purchaser of a mobile home park within a mobile home park may become a tenant of the park if such purchaser would otherwise qualify with the requirements of entry into the park under the park rules and regulations, subject to the approval of the park owner, but such approval may not be unreasonably withheld.

Fla. Stat. § 723.059(1). The purchaser is entitled to assume the remainder of the term of any rental agreement

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[1] This Brief is submitted with the written consent of all parties filed with the Clerk of the Court.

between the seller and the mobile home park owner. Fla. Stat. § 723.059(3). However, the park owner may, within certain guidelines, increase the amount of the rent upon the expiration of the assumed rental agreement. Fla. Stat. § 723.059(4). Florida law also severely restricts the park owner's right to evict a tenant. Fla. Stat. § 723.061. The current situation which exists in California as a result of the interplay between California mobile home law and local rent control ordinances could not presently occur in Florida because the control of mobile home lot rents is expressly preempted to the state. Fla. Stat. § 723.004(1).

Nevertheless, FMHA has a vital interest in the outcome of this case because FMHA believes that if this Court determines that the Escondido ordinance in combination with California law does not effect a taking, that the State of Florida may enact similar legislation. The enactment of rent control legislation without provision for vacancy decontrol in Florida would have devastating consequences.

SUMMARY OF THE ARGUMENT

FMHA will not attempt to address all the arguments presented in this case. Instead, FMHA will focus on three important issues: 1) whether the City of Escondido ordinance in conjunction with California mobile home law effects an unconstitutional taking; 2) whether the combined legislation substantially advances a legitimate state interest; and 3) whether the challenged legislation provides just compensation.

FMHA will first demonstrate that the City of Escondido ordinance against the background of existing California law effects an unconstitutional taking. This is consistent with past decisions of this Court. This Court has not previously found rent control legislation to be a per se taking. Nor has this Court found that legislation which allows a tenant to choose his successor is unconstitutional. Nevertheless, the combination of the two is unquestionably unconstitutional, as will be shown below.

FMHA will next show that vacancy control does not substantially advance any legitimate state interest. Vacancy control does nothing to further the state interest in providing affordable housing to its citizens. In fact, vacancy control has exactly the opposite effect of artificially inflating the cost of existing mobile homes and creating a windfall for the current owners.

Finally, FMHA will show that the challenged legislation does not provide just compensation to the park owner. The provision in the ordinance for a reasonable rent compensates the park owner only for the temporary use of his land. The ordinance does not provide compensation to the park owner for the permanent deprivation of the use of his land. Therefore, the ordinance does not provide just compensation as required by the United States Constitution.

ARGUMENT

I. THE CITY OF ESCONDIDO ORDINANCE IN CONJUNCTION WITH CALIFORNIA MOBILE HOME LAW EFFECTS AN UNCONSTITUTIONAL TAKING.

The City of Escondido rent control ordinance coupled with existing California law, which substantially restricts a mobile home park owner's ability to choose his tenants, effects an unconstitutional taking. Thus, the challenged legislation violates the Fifth Amendment to the United States Constitution. The takings clause of the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. Chicago,* 166 U.S. 226, 235-41 (1897).

This Court has not previously addressed the question of whether rent control legislation in combination with restrictions on the right of a mobile home park owner to control the identity of his tenants violates the takings clause. This Court has previously declined to find rent control legislation unconstitutional per se and declined a request to reconsider the constitutionality of rent control per se. *Pennell v. City of San Jose,* 485 U.S. 1, 12 n.6 (1988). This Court specifically declined to address the issue of whether the combination of rent control and restriction of a landlord's power to evict a tenant amounted to a physical taking of the landlord's property. *Id.* at 11 n.5.

This Court has never previously addressed the specific issue of rent control in mobile home parks. Therefore, this brief does not address the issue of the constitutionality of rent control, nor does it address the constitutionality of restrictions on the landlord's right to

determine who his tenants will be. However, the combination of rent control and vacancy control necessarily effects a physical taking of the mobile home park owner's property by giving the mobile home park tenant a permanent possessory interest in the park owner's land by virtue of the unfettered right of the mobile home owner to transfer his interest in the housing that is the subject of the rent control. The local ordinance is not necessarily constitutional just by virtue of the rent control component. As the Ninth Circuit has opined, a city may not "eviscerate a property owner's rights and shield its actions from constitutional scrutiny by calling it rent control." *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1986).

Previous decisions of this Court finding rent control legislation to be constitutional are distinguishable from the instant case. In *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), this Court acknowledged that "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Id.* at 440. As authority for such proposition, this Court cited numerous previous Supreme Court cases, including rent control cases. This Court recognized that "[i]n none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party." *Id.* This Court implicitly recognized that a different analysis is required where regulations require the landlord to suffer possession of his land by a third party. *Id.*

This Court has long differentiated between regulatory takings and takings in the form of physical occupation. *Id.* at 426. "When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Id.* at 427 (footnote omitted). "[P]ermanent occupations of land . . . are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Id.* at 430. By contrast to the small amount of space taken in *Loretto,* the legislation challenged herein allows permanent possession of entire lots within the mobile home park. "[A] permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* at 432 (footnote omitted). Property rights include the rights to possess, use and dispose of the property. *Id.* at 435. The legislation challenged herein allows the tenants to possess, use, and dispose of the park owner's property. The park owner retains almost nothing of the bundle of rights, other than the right to collect below-market rents. A permanent physical occupation of the property of another is "perhaps the most serious form of invasion of an owner's property interests . . . [because] the government does not simply take a single 'strand' from the 'bundle' of property rights; it chops through the bundle, taking a slice of every strand." *Id.*

The legislation challenged herein allows a third party to occupy the park owner's land forever. The park owner is essentially powerless to remove the stranger from his land. The position of the park owner as to the initial

tenant may be said to be analogous to that of the shopping center owner in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980). In *PruneYard,* the shopping center owner had opened his property to the public at large. *Id.* at 83. Similarly, with regard to the initial tenant, the park owner opens his property to the tenant. The park owner has made the initial decision to allow the tenant on his land.

However, with regard to the tenant's successors, the park owner is given no choice. He is required to suffer the occupation of his land by strangers of the tenant's choice. This Court has recognized that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Loretto,* 458 U.S. at 436. When the state allows a third party to occupy the landlord's land, a taking occurs the same as if the state itself were occupying the land. "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." *Id.* at 432 n.9.

Thus, the park owner's situation under current California law more closely resembles that found in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). In *Kaiser Aetna* the landowner had opened his marina to lessees for a fee. *Id.* at 168. The marina was not generally open to the public. *Id.* The marina owner dredged a channel connecting the property to an adjacent bay to provide access to the Pacific Ocean for boat traffic. The Corps of Engineers asserted that the public had the right to use the facilities under a "navigational servitude." This Court held that a governmentally-required public easement in the marina was a taking. *Id.* at 180. Similarly here, the government is

requiring the park owner to allow the public access to the rent controlled property by allowing the tenant to decide who may purchase the mobile home and reside on the lot.

The decisions of lower courts finding that rent control legislation without vacancy decontrol effects a taking by allowing occupation of the property by the tenant are well-reasoned and this Court should adopt the positions taken therein. Two are decisions of the Ninth Circuit Court of Appeals. The other is a decision of the Third Circuit Court of Appeals. An examination of the reasoning of these three cases may help illuminate the issues before this Court.

In the first case, *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), the challenged ordinance was a rent control ordinance applicable to mobile home parks. In addition to the rent control provisions, the ordinance required the park owner to offer leases of unlimited duration. *Id.* at 1273. The court used a three-part test in adjudicating the park owners' claim: "(1) Did the governmental action amount to a taking of property? (2) Did it advance a legitimate governmental interest? (3) Was there just compensation?" *Id.* at 1274-75 (citations omitted). The court held that an unconstitutional taking occurred if the first question is answered in the affirmative and either of the remaining two questions is answered in the negative. *Id.* at 1275.

Hall focused on the possessory nature of the tenants' interest and recognized that this Court "reaches dramatically different results depending on whether it concludes that a particular governmental action amounts to a physical occupation of property or merely a regulation." 833

F.2d at 1275. The court then determined that the challenged ordinance transferred a possessory interest in property to the mobile home tenant. Under the ordinance, "the landlord's residual rights in the property are largely at the mercy of his tenants; he loses practically all right to decide who occupies the property, and on what terms." *Id.* at 1276. The court further stated, "If a tenant moves, the tenant alone decides who will be his successor by selecting the buyer for his rental unit; the landlord has no meaningful say as to who will live on the property, now or in the future." *Id.*

The court realized that the tenant was given "an economic interest in the land that he can use, sell, or give away at his pleasure." *Id.* Similar to the legislation before this Court, the legislation before the *Hall* court allowed removal of tenants for cause. Nevertheless, the court recognized that the tenants were "given an indefeasible right to possession so long as they pay the controlled rent and behave themselves." *Id.* at 1277. The court determine that as the ordinance was alleged to operate, "landlords are left with the right to collect reduce rents while tenants have practically all other rights in the property they occupy. . . . [T]his oversteps the boundaries of mere regulation and shades into permanent occupation of the property for which compensation is due." *Id.* at 1280.

Recently, the Ninth Circuit again addressed rent control in mobile home parks in *Azul Pacifico, Inc. v. City of Los Angeles*, 1991 WL 224528 (Nov. 1, 1991). The court followed the reasoning it had applied in *Hall*, 833 F.2d 1270, reaffirming the validity of the three-part test. However, *Azul Pacifico* reached the court in a different procedural posture. Unlike *Hall*, a trial on the merits had

been held. Thus, what had been found by the *Hall* court as theory was found as fact by the district court in *Azul Pacifico*.

The Third Circuit reached the same conclusion in *Pinewood Estates v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990). New Jersey law regulated the relationship between mobile home owners and park owners and prohibited park owners from requiring the removal of a mobile home from the park upon sale of the mobile home. The town of Barnegat enacted a rent control ordinance which did not provide for vacancy decontrol. The court determined that the challenged legislation permanently transferred a possessory interest in the rent-controlled park from the park owner to the tenant without compensation. The court found that the new tenants who paid a premium for the privilege of purchasing a mobile home in a rent-controlled park were in actuality paying advanced rent for the lot. However, the rent was paid not to the landlord, as it should be, but to the selling tenant.

The reasoning of the federal courts in *Hall*, *Azul Pacifico*, and *Pinewood Estates* is sound and comports with precedents of this Court. However, these cases do not go far enough. For example, all seem to rely heavily on the fact that the tenant is able to exact a premium for his mobile home as a result of the legislation. However, even if the tenant could not exact such a premium, the challenged legislation would be unconstitutional. The premium received by the tenant provides one method of determining the amount of compensation due. However, the tenant's ability to collect the premium is not a prerequisite to the finding of a taking.

As an extreme example, clearly if the legislation allowed the tenant to devise his leasehold interest in the land, that would effect a taking despite the fact that the tenant would receive no premium. The right to devise property is one of the most important property rights. "In one form or another, the right to pass on property . . . has been part of the Anglo-American legal system since feudal times." *Hodel v. Irving*, 481 U.S. 704, 716 (1987). To allow the tenant to devise his leasehold would enable the tenant and his devisees to occupy the park owner's land in perpetuity, thus creating a permanent physical invasion of the park owner's land which is necessarily a taking.

The Third Circuit appeared to recognize this distinction, for the court stated that the focus should not be on the additional compensation or "premium" which the tenant receives, but on the fact that the park owners are deprived of compensation for the loss of a possessory interest in their land. 898 F.2d 353. Curiously, however, the court went on to state that the local ordinance in conjunction with state law had "*created* valuable property interests for which" the park owners were not compensated. *Id*. The court's analysis is somewhat flawed because in actuality, no new interest is created. What occurs is simply a *transfer* of an existing monetary interest from the landlord to the tenant. The increase in value of the tenant's home corresponds to a decrease in the value of the landlord's property. The new tenant will pay the same amount in the long run. Under the unconstitutional scheme, he will pay the value of future reduced rents to the selling tenant in the purchase price of the mobile home.

The Third Circuit distinguished this Court's prior rent control cases on the basis of what the court saw as two significant differences between the challenged legislation and the typical urban rent control: "First, in urban apartment rent control it is the landlord who chooses, selects, and rents to the new tenants. No other party can sell the right to occupy the landlord's premises. Second, the tenant cannot occupy in perpetuity. Thus, the tenant does not acquire an inheritable right." *Id.* at 355.

Recent takings decisions of this Court do not undermine the foregoing analysis. This Court's decision in *Pennell v. San Jose*, 485 U.S. 1 (1988) fails to provide support for the position of Respondent herein. *Pennell* involved a challenge to a rent control ordinance which allowed a hearing officer to consider "hardship to a tenant" in deciding whether to permit a rent increase. This Court did not decide whether an unlawful taking occurred. The plaintiff's claim was found to be premature because the record failed to show that tenant hardship had ever actually been used as a factor to deny a rent increase. *Id.* at 9-10.

FCC v. Florida Power Corp., 480 U.S. 245 (1987), may, upon the most superficial level, be similar to the instant case. However, upon closer analysis, any similarities fade. In *FCC* this Court upheld a law which regulated the amount which could be charged by a utility company for the leasing of space on utility poles to cable television operators. *Id.* at 247. This Court found no taking. In distinguishing *Loretto*, this Court noted that the legislation before it did not give cable companies "any right to occupy space on utility poles," nor did the legislation "prohibit[ ] utility companies from refusing to enter into

attachment agreements with cable operators." *Id.* at 251 (footnote omitted). In *FCC* this Court again reiterated that economic regulations of the relationship between landlords and tenants are not per se takings so long as they do not require the landlord to surrender possession of his property to a third party. *Id.* at 252. The significant difference between the situation in *FCC* and that in *Loretto* was that in *FCC*, the landlord had invited the tenant onto his property. The government then had the right to regulate that relationship. In *Loretto*, by contrast, the landlord had not invited the third party onto her property.

The situation created by the interplay between the Escondido ordinance and California mobile home law is more analogous to the situation in *Loretto*. The park owner initially invites a tenant onto his land. At that point the rule in *FCC* applies and the government may regulate the rent. However, at the point where the government requires the landlord to accept a new tenant, one he did not invite, at the same reduced rent, the government has effected an unlawful taking of the landlord's property. In *FCC*, this Court specifically did not decide what the application of *Loretto* would be "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *FCC*, 480 U.S. at 251 n.6. Now this Court has the opportunity to address that question. FMHA respectfully suggests that this Court should decide that where the landlord is required to enter into, renew, or refrain from terminating rental agreements and the rent is controlled, an unlawful taking occurs.

To illustrate, suppose rent control legislation were enacted which provided that the park owner could raise

the rent to the market rate when the tenant sold the mobile home, but further provided that the difference between the controlled rent and the market rent would be paid to the selling tenant rather than to the park owner. Such legislation would unquestionably violate the takings clause. The legislation challenged herein does exactly the same thing, but requires the incoming tenant to pay the rent in a lump sum in advance in the form of a premium in purchasing the mobile home. The unlawful taking results from the fact that the park owner does not receive the full rent rather than the fact that the selling tenant does receive the rent.

II. THE CHALLENGED LEGISLATION DOES NOT SUBSTANTIALLY FURTHER A LEGITIMATE STATE INTEREST.

The next issue which must be addressed is whether the challenged legislation substantially furthers a legitimate state interest. This Court has "long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). Furthermore, "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978).

Assuming that the legislation was enacted to alleviate a shortage of affordable housing, FMHA does not

challenge that as a legitimate state interest. However, the challenged legislation fails to substantially further that interest. In *Hall*, the Ninth Circuit declined to express a view on the issue of whether the legislation therein substantially advanced a legitimate state interest. However, the court noted:

> If appellants are able to prove their allegations, it would seem that the Santa Barbara ordinance will do little more than give a windfall to current mobile park tenants at the expense of current mobile park owners. If, as appellants allege, the ordinance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower-income families seeking access to rental units in mobile park homes.

833 F.2d at 1282. The challenged legislation does not further a public purpose; instead, it provides a large benefit to a small group of existing mobile home tenants.

More recently, the Ninth Circuit suggested an alternative state interest which was furthered by the lack of vacancy decontrol as a part of rent control legislation. The court was concerned that existing tenants benefiting from rent control would suffer a significant injury when they decided to sell their homes. The fear of the court was that when rent-control tenants sold their homes, they would be forced to sell their homes at substantially reduced rates because with vacancy decontrol the landlord could set the rent for the new tenant so high that no one would want to buy the mobile home. This fear, however, defies logic. If the park owner has a tenant who is protected by rent control and the legislation provides for

vacancy decontrol, sale of the home is obviously in the landlord's best interest, because he is provided with an opportunity to increase the rent. Therefore, the park owner's interest will be in avoiding any increase which would prohibit the sale of the mobile home. The park owner will realize that if he negotiates too high a rent, the sale will not be consummated and he will continue to receive below market rents due to the rent control protection afforded the current tenant.

III. THE CHALLENGED LEGISLATION DOES NOT PROVIDE JUST COMPENSATION.

The final question which FMHA will address is whether the challenged legislation provides just compensation. As will be shown below, the legislation fails to provide adequate compensation. It is simplistic to argue that the allowance of "reasonable rents" provides just compensation. The rents, reasonable or otherwise, compensate the park owner, but only for the temporary occupation of his property by the tenant. The park owner is not provided any form of compensation for the permanent deprivation of the possession of his property. Assuming that the California laws restricting the park owner's right to exclude future tenants from his land are constitutional, such constitutionality must be based on the fact that, in the absence of rent control, the park owner is justly compensated for the use of his property. When the new tenant comes in, the park owner is given the opportunity to renegotiate the rent and to receive the market rate for his land. Thus, even if the perpetual right given to the tenant is a taking, it is not unlawful, because

the park owner is justly compensated. On the other hand, in the situation presently before this Court, where the rent control is not subject to vacancy decontrol, the park owner is not justly compensated. Therefore, the taking is unconstitutional.

Even if the legislation is allowable, and substantially furthers a legitimate state interest, the inquiry does not end there. "Whether compensation is adequate is an inquiry separate from whether there has been a taking." *Hall*, 833 F.2d at 1278. The Fifth Amendment "is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987).

No matter how laudable the public purpose, if a taking occurs, the government must provide compensation. As this Court has reiterated, " 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' " *Id.* at 321-22 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

If the public purpose is so important, then the public should be forced to bear the burden of paying for it. "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.* at 318-19 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). If a shortage of affordable housing

exists and the need is so great that tenants should be given the right to control their leasehold property in perpetuity, then the public should bear the cost of such government help in the form of housing subsidies or otherwise.

CONCLUSION

Based on the foregoing analysis, the decision of the lower court should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1991

JOHN K. YEE, et al.,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS JOHN K. YEE, ET AL.

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS JOHN K. YEE, ET AL.

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners John K. Yee, *et al.* Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit corporation organized under the laws of the State of California for the

purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys.

PLF has participated in numerous cases involving the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). PLF's public policy perspective and litigation experience in support of private property rights will provide a helpful additional viewpoint on the constitutional issues presented in the case at bar.

STATEMENT OF THE CASE

Petitioners, owners of mobile home parks in the City of Escondido, brought an action in state court challenging, as a taking without compensation, the city's mobile home rent control ordinance. The ordinance, in concert with the state Mobilehome Residency Law (Cal. Civ. Code § 798, *et seq.*), grants the owners of coaches situated in petitioners' parks a perpetual right to occupy petitioners' property at below market rents. Anyone who purchases a mobile home coach from an existing occupant of an Escondido park acquires that same right.

Petitioners allege that the in-site price of coaches in Escondido mobile home parks has increased dramatically since passage of the rent control ordinance. They allege that this increase is due entirely to the fact that existing park occupants are able to monetize the value of perpetual occupancy of the park owners' property at controlled rents. *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1352 (1990).

Rather than let petitioners prove these allegations at trial, the trial court sustained the city's demurrer, without leave to amend, and dismissed the action. The California Court of Appeal affirmed, ruling that the complaint did not state a cause of action for an uncompensated taking under the Fifth Amendment to the United States Constitution. The California Supreme Court declined to review the decision.

Three federal appellate court decisions have held that regulations virtually identical to Escondido's violate the Takings Clause under the "permanent physical invasion" standard laid down by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). These three decisions, *Hall v. City of Santa Barbara*, 797 F.2d 1493 (9th Cir. 1986); *Pinewood Estates v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990); and *Azul Pacifico, Inc. v. City of Los Angeles*, No. 90-55853, 90-56066 (9th Cir. Nov. 1, 1991) (1991 WESTLAW 224528 CTA9 Database) are soundly based on the Fifth Amendment and are unassailably correct expressions of federal constitutional law.

Petitioners' counsel argues capably that this line of authority is dispositive in establishing that the facts alleged in this case would comprise a violation of the

Takings Clause. While not disputing that conclusion, this amicus will go farther and argue that such a finding employs a *needlessly stringent* constitutional standard. It is in fact irrelevant whether the Escondido ordinance violates *Loretto*'s physical invasion test, since the measure in question is blatantly unconstitutional under this Court's more general regulatory takings doctrine. Indeed, it can be further argued that an outright uncompensated transfer of a property interest from one private party to another is a *per se* violation of the Takings Clause, subject neither to the general regulatory takings analysis nor to the *Loretto* standard. Under either line of reasoning the Escondido ordinance must be found to violate the Takings Clause *irrespective of whether this Court believes a Loretto-style permanent physical invasion has occurred.*

SUMMARY OF ARGUMENT

Petitioners have alleged facts showing that the City of Escondido's regulations have confiscated a valuable property interest from petitioners and transferred it to certain third parties without compensating petitioners for their loss. The property interest at issue—a marketable servitude in land—is recognized by state law and protected by the United States Constitution. These allegations, if proven at trial, are sufficient to establish a violation of the Takings Clause under three separate legal theories.

Two United States Circuit Courts of Appeals have determined that virtually identical facts establish a constitutional violation under the "permanent physical

invasion" theory. *Hall v. City of Santa Barbara*, 797 F.2d 1493; *Pinewood Estates v. Barnegat Township Leveling Board*, 898 F.2d 347; and *Azul Pacifico, Inc. v. City of Los Angeles*, 1991 WL 224528.

Petitioners' allegations would also establish a regulatory taking under this Court's guidelines in *Nollan v. California Coastal Commission*. The city's uncompensated seizure of petitioners' property advances no legitimate governmental interest. By transferring a marketable servitude from petitioners to other private parties, the City of Escondido has deprived petitioners of economically viable use of this valuable property interest. Finally, the city's regulations unfairly force a small group of property owners to bear the full costs of what should be a general public burden.

A third line of this Court's decisions, including *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and *Hodel v. Irving*, 481 U.S. 704, demonstrates that the outright uncompensated transfer of an interest in title constitutes a *per se* taking. Under this line of precedent, the regulations at issue in this case violate the Takings Clause irrespective of the outcome of the regulatory takings analysis and regardless of whether a physical invasion has occurred.

Because petitioners have stated a cause of action under any of these three theories, they are entitled to a trial to establish the truth of their allegations.

ARGUMENT

I

THE PROPERTY INTEREST AT ISSUE IN THIS CASE IS A MARKETABLE SERVITUDE CONVEYED TO SPECIFIC THIRD PARTIES BY THE CITY'S REGULATIONS

To determine whether an unconstitutional taking of property has occurred, the first step is to identify the property interest in question. The inquiry then turns to whether this specific property interest has been taken, applying the tests laid down by this Court for either regulatory or *per se* takings.

In the present case, the relevant property interest is a marketable servitude to occupy petitioners' land at below-market rents—a property interest recognized by state law and protected by the United States Constitution.

According to the complaint reviewed by the court below, Escondido's mobile home rent control limits the rents petitioners may charge for space in their parks to less than the amount that would be charged in an unregulated market. The city has also imposed vacancy control which means that petitioners may not adjust their rents to market levels even when a preexisting resident of their parks terminates a tenancy, sells his mobile home coach to a new resident, and moves out. Related state regulations prevent park owners from exercising any meaningful role in determining who may purchase a used coach in their parks from a preexisting resident. Thus, prospective coach buyers negotiate with preexisting residents to determine the price for a used coach *and* a statutory right to occupy petitioners' parks at less-than-market rent.

Under California law, one of the interests inhering in the ownership of property is the right to receive the rents and profits therefrom. *Calahan v. Martin*, 3 Cal. 2d 110, 119, 123 (1935). *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The owner of a mobile home park may sell the right to collect rents from the park, or any part of those rents, thereby transferring a property interest which is called, by statute, a "servitude." Cal. Civ. Code § 802(4); *see Calahan*, 3 Cal. 2d at 120-21.

It is this marketable servitude that the Escondido regulations transfer from petitioners to the individuals who occupied their parks when the controls were adopted. Prior to enactment of the challenged regulations, Escondido's mobile home coach owners could have purchased a servitude from park owners guaranteeing them perpetual coach sites at below-market rents. The price of this servitude would have been determined through negotiations between park owners and coach owners, and the park owner would have received the agreed-upon amount in exchange for the property interest. Escondido's regulations preempt this market process by simply transferring the servitude to coach owners, who may then sell it to third parties without compensating park owners.

Escondido's regulatory scheme is far more than a mere restriction of petitioners' right to use their property. Rather, it grants a right to a specific group of individuals —those who occupied petitioners' parks when the controls were enacted—to use and dispose of a valuable property interest without petitioners' consent and without compensation. As stated by the Ninth Circuit in *Hall*

v. City of Santa Barbara, such an enactment "changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land." *Hall*, 833 F.2d at 1279.

The servitude that is granted to preexisting coach owners by the Escondido ordinance is a valuable commodity of a sort that can be freely bought and sold in the open market. The fair market value of the servitude can be estimated by the resale premium commanded by coaches located in petitioners' parks compared with identical coaches located on unregulated sites. *See* Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399 (1988).

This Court has set forth a number of tests to determine whether the City of Escondido, in depriving petitioners of the use and control of this valuable property interest, has violated the Takings Clause. The next section of this brief argues that petitioners have stated a claim for an unconstitutional taking of their property under this Court's standards for *regulatory* takings. In the alternative, it is then argued that the facts alleged by petitioners are sufficient to constitute a *per se* taking, *irrespective* of whether the city has authorized a "permanent physical invasion" of petitioners' land.

II

THE CALIFORNIA COURT OF APPEAL ERRED IN NOT FINDING A TAKING UNDER THIS COURT'S REGULATORY TAKINGS DOCTRINE

For nearly 70 years this Court has recognized that government regulation can so attenuate the rights of

property owners as to effect a taking under the Fifth Amendment. The criterion first laid down by Justice Holmes in 1922 applies with equal force today: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The process of determining when a regulation "goes too far" has been revealed gradually by a line of decisions extending from *Pennsylvania Coal* down through what is currently this Court's leading decision in the field of regulatory takings law, *Nollan v. California Coastal Commission*, 483 U.S. 825.

A. Heightened Judicial Scrutiny Is Triggered when Property Regulations Are Challenged as Regulatory Takings

In *Nollan*, it was unequivocally proclaimed that property regulations challenged under the Takings Clause must receive heightened judicial scrutiny. *Nollan*, 483 U.S. at 835 n.3. Such enactments may no longer be upheld by reference to a "rational relationship" to their asserted objectives.

Nollan's heightened scrutiny requirement has been correctly noted and applied by state courts faced with federal takings claims brought under the Fourteenth Amendment. *See, e.g., Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068 (1989) (challenges of this sort require " 'semi-strict or heightened judicial scrutiny of regulatory means-ends relationships' as articulated in

Nollan"); *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 1270 (1991) ("*Nollan*, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test ... no longer controls." (Footnotes omitted)).

Notwithstanding this clear constitutional mandate, however, the California Court of Appeal in the proceedings below failed to apply the requisite level of scrutiny to the Escondido ordinance.

B. The Escondido Ordinance Does Not Substantially Advance a Legitimate Purpose Because New Park Residents Must Still Pay the Equivalent of Market Rent and Less Intrusive Alternatives Are Available

This Court has frequently stated that land use regulations will effect a taking if they fail to "substantially advance legitimate state interests," or if they "den[y] an owner economically viable use" of property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). These two elements, which establish a threshold test of constitutional legitimacy, are stated in the disjunctive; *either* is sufficient to establish a regulatory taking without further analysis.

In *Nollan v. California Coastal Commission*, this Court reiterated the two-part threshold test. *Nollan*, 483 U.S. at 834. *Nollan* clearly illustrated that, when a regulation fails to substantially advance a legitimate government

interest, a taking occurs regardless of the economic impact on the property owner.

In the case at bar, the Escondido ordinance has been alleged to effect an uncompensated transfer of property from one group of private owners to another. The court below acknowledged that the city's regulations effected the alleged "transfer of value," yet found such forced transfers to be supported by a rational governmental interest and therefore not in conflict with the Takings Clause. *Yee v. City of Escondido*, 224 Cal. App. 3d at 1354.

In arriving at this conclusion, the California Court of Appeal fundamentally misconstrued the legal question that was before it. By framing the issue as whether the forced transfer of petitioners' property "can be justified by a rational governmental purpose," *id.*, the court below expressly applied the deferential "rational basis" standard of review repudiated by this Court in *Nollan*:

> "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *not* that 'the State *"could rationally have decided"* that the measure adopted might achieve the State's objective.' " *Nollan*, 483 U.S. at 835 n.3 (citations omitted; emphasis added).

This Court's regulatory takings doctrine does not permit abject judicial deference to legislative enactments merely because the measure at issue can be imagined to have some rational purpose. Rather, the courts have a duty to inquire whether property regulations challenged

under the Takings Clause *substantially advance* a legitimate interest. *Id.* The court below made no inquiry whatever into this question, which this Court has set forth as a mandatory threshold inquiry in regulatory takings cases.

The City of Escondido asserts that the legitimate interest advanced by its regulation is "protecting mobilehome owners" from paying competitive market rentals for space in mobile home parks. Respondent's Brief in Opposition to the Petition for Certiorari at 27. But that goal is accomplished for current park residents by rent control alone without imposing the additional burdens of vacancy controls (which prevent park owners from setting rents at market levels when current residents leave their parks).

It is sometimes claimed that vacancy controls are intended to secure the benefits of reduced rents for *future* park residents, yet this is a logical absurdity. Elementary economics demonstrates that the difference between controlled and market rents is capitalized into the in-site price of mobile home coaches. Hirsch & Hirsch, 35 UCLA L. Rev. at 443-44. Thus, the initial occupants of petitioners' property will convert the regulatory "protection" to cash as soon as they sell their coaches. No subsequent residents will benefit, for they must pay the full capitalized value of lower rents at the time they "buy into" the city's regulatory scheme. Under the heightened scrutiny required by *Nollan*, it is inconceivable that any court could find this one-time wealth transfer to *substantially advance* the welfare of mobile home owners in general.

Finally, the Ninth Circuit has speculated that regulations of this kind may serve a legitimate purpose in

protecting current residents from unscrupulous park owners who might otherwise raise rents at the end of a tenancy to force the sale of coaches to park owners at distressed prices. *Azul Pacifico*, 1991 WL 224528 at 12-16. Once again, however, the court has simply identified a possible legitimate objective with no meaningful inquiry into whether the ordinance in fact substantially advances this objective.

In an earlier formulation of the substantial advancement test this Court stated, "a use restriction on real property may constitute a 'taking' if not *reasonably necessary to the effectuation of [its] purpose.*" *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978) (emphasis added). Clearly, seizing an uncompensated property interest from *all* park owners cannot remotely be described as "reasonably necessary" to prevent unscrupulous business practices by a few.

The City of Escondido could simply prohibit park owners from buying their residents' coaches. Or it could require such transactions to occur at fair market value as established by Blue Book prices or independent appraisal. By choosing to bypass these straightforward alternatives in favor of adopting a blatantly confiscatory regulation, Escondido has forfeited any claim that its ordinance is reasonably necessary to prevent the unfair dealings hypothesized in *Azul Pacifico*.

C. The California Court's Spurious "Economic Analysis" Cannot Substitute for the Heightened Scrutiny Required by this Court in Nollan

Petitioners alleged facts demonstrating that occupants of petitioners' mobile home parks had capitalized

the value of a marketable servitude into the in-site price of their coaches. Applying the heightened scrutiny required by this Court in *Nollan*, it would be impossible to avoid the implication that the City of Escondido's regulations had confiscated this servitude from petitioners and transferred it to those occupants without compensation.

As previously noted, however, the court below persistently declined to subject the challenged ordinance to heightened scrutiny. Instead, the California Court of Appeal indulged in a burlesque of pseudo-economic "analysis" in an effort to insulate the regulation from attack.

Rejecting the expert analysis of economic professionals (*cf.* Hirsch & Hirsch, *supra*), the court concocted its own fanciful lay theory analogizing the confiscation of petitioners' property to an adjustment in the prices of complementary goods. *Yee*, 224 Cal. App. 3d at 1352-53.

The fallacy in the court's reasoning is embarrassingly obvious. The relationship between true complementary goods does not vary radically from place to place within a market area—certainly not within a market the size of Escondido. If market forces (say, an increase in supply) had caused the value of mobile home parks to fall, the price of coaches would increase throughout the area. This would be a genuine adjustment in complementary prices —but this was emphatically *not* consistent with the allegations before the California court.

Mobile home rent regulations like Escondido's do not cause an increase in the price of all mobile home coaches,

as would occur through an adjustment in prices of complementary goods. Instead, only certain coaches are affected—specifically, those situated in existing parks. The prices of coaches occupying pads in parks such as petitioners' increase while the prices of coaches on unregulated sites and in dealer showrooms are unaffected. *See* Hirsch & Hirsch, 35 UCLA L. Rev. at 425, 430, 433-34. This is completely at odds with a "complementary goods" rationale but fully consistent with petitioners' claim that a valuable property interest had been seized and transferred to the owners of those specific coaches.

The crucial error, however, does not lie in the obvious shortcomings of the California court's purported "economic analysis." Rather, this remarkable exercise merely underscores the fact that the court was extending the greatest possible deference to the city's enactment. Rather than applying any semblance of heightened scrutiny, the court below attempted to concoct some arguably rational basis for the challenged ordinance. This directly contravenes the clear guidance of this Court as expressed in *Nollan* and resulted in a clearly erroneous finding of constitutionality.

D. The Escondido Regulation Deprives Petitioners of Economically Viable Use of Their Property

Turning to the second prong of the threshold test for regulatory takings, this Court has made it clear that regulations which deprive owners of economically viable use of their property will violate the Takings Clause, regardless of the merits of the state interests that may be

advanced. *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 295-96 (1981); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984). The California Court of Appeal committed yet another fundamental error in the proceedings below by failing to subject the Escondido ordinance to this constitutionally mandated, independently sufficient test for a regulatory taking.

There can be no doubt that the servitude transferred by the City of Escondido to the owners of mobile home coaches is a protected property interest under the Fifth Amendment. This Court has defined the interests subject to constitutional protection as all those rights inhering in an individual's relation to the thing owned, including the rights of possession, use, and disposal. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Constitutionally protected property interests include not just fee interests and leaseholds, but "every sort of interest the citizen may possess." *Id.* at 378.

Especially in recent years, this Court has demonstrated a commitment "to what might be termed an 'unbundling' of property interests for purposes of applying the legal criteria in takings cases." Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 357 (1988). Specific property interests that have been recognized by this Court under the Takings Clause have included the use of airspace, *United States v. Causby*, 328 U.S. 256 (1946); flowage easements, *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961); the right to devise property to one's heirs, *Hodel v. Irving*, 481 U.S. at 716; the right to exclude others, *Kaiser Aetna v. United States*, 444 U.S. 164; and

most pertinent to this case, the right to the profits from one's property, *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. at 164.

In the case at bar, the property interest in question is a marketable servitude granting perpetual occupancy in petitioners' mobile home park at below-market rents. By confiscating this servitude and transferring it to others, the Escondido ordinance completely deprives petitioners of any economically viable use (or indeed, any use at all) of this valuable property.

In describing the challenged measure as a "transfer of value," the court below implicitly acknowledges that the subject property interest has been seized from petitioners and transferred to the private beneficiaries of the ordinance. *Yee*, 224 Cal. App. 3d. at 1354. However, the court goes on to assert that such uncompensated transfers do not offend the Takings Clause if they are "justified by a rational governmental purpose." *Id.* The court then inquires into the level of rents authorized by the ordinance asserting that if petitioners are receiving a "fair" return *on their mobile home parks*, there has been no taking *of the servitude*.

By this assertion, the court below would simply eliminate the second prong of this Court's threshold test for regulatory takings. By the Court of Appeal's reasoning, unless a regulation deprives an individual of *all* property, it does not deprive him of *any* property. Such a contention is not only absurd on its face, it is directly contrary to the teachings of this Court.

This Court did not hesitate to find a regulatory taking in *Nollan*, although the affected property interest was

only a narrow unbuildable strip of the owners' land. *Nollan*, 483 U.S. at 828. This Court made the proper standard even more explicit in *Hodel v. Irving*, 481 U.S. at 704. That case involved a challenge to a federal statute providing that certain fractional property interests in Sioux Indian land must revert to the tribe upon the owner's death and could not be passed on to his survivors. In finding that this statute violated the Takings Clause, the Court fully considered the extent of the property right that was at issue: "Of course, the whole of appellees' decedents' property interests were not taken. . . . There is no question, however, that *the right to pass on valuable property to one's heirs is itself a valuable right.*" *Hodel v. Irving*, 481 U.S. at 714 (emphasis added). The law's complete deprivation of *this single element* of the owner's bundle of rights was sufficient for a unanimous Court to find that a compensable taking had occurred. *Id.* at 716-17.

In the case at bar, the Escondido ordinance completely deprives petitioners of a valuable servitude and transfers its ownership to third parties. No greater deprivation of economically viable use is imaginable. Under the clear standards laid down by this Court, the city's total deprivation of petitioners' use of this marketable property interest violates the Takings Clause in and of itself, without regard to the legitimacy of the governmental purposes being advanced.

E. The Escondido Ordinance Unfairly Requires a Small Group of Property Owners to Bear What Should Rightfully Be a General Public Burden

The two-part "substantial advancement/deprivation of use" test serves as a threshold that land use regulations must clear as the first step in determining whether they violate the Takings Clause. Measures that fail to substantially advance legitimate interests or deny economically viable use of property must be struck down without further ado unless just compensation is paid. However, even regulations that meet these threshold requirements may still be held to violate the Takings Clause under a number of specific criteria that have been developed by this Court.

In the case at bar, even if it were possible to hold that the Escondido ordinance survives the two-part threshold test, it violates the Takings Clause by requiring plaintiffs alone to bear what should rightfully be a general public burden. As this Court has repeatedly emphasized, "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 346 U.S. 40, 49 (1960)).

The benefit sought by Escondido's ordinance is the provision of subsidies for a small, favored class of property owners--those specific individuals who owned mobile homes located in existing parks at the time the ordinance was adopted. This benefit can be construed in

only two possible ways. It may accrue primarily to the favored few individuals, in which case the benefit is clearly private in nature; or transferring property to these few persons may be held, in some metaphysical sense, to enhance the general welfare of the city.

If the benefits of Escondido's regulations are limited to the coach owners who happened to occupy park sites at the time of enactment, then the city has done nothing more than to force the uncompensated transfer of a valuable property interest from one small group of owners to another. Such a private-interest transfer would violate the Takings Clause on its face. "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984).

In the alternative, if it is claimed that the regulations provide some diffuse public benefit in the nature of a general welfare program, then the city is constitutionally prohibited from singling out a small group of owners to bear the costs of the regulation. Any claim of general, citywide benefit from the transfer of the subject property interest would demonstrate "that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpayers as a whole." *Seawall Associates*, 542 N.E.2d at 1069. *See also Pennell v. City of San Jose*, 458 U.S. 1, 21-22 (1988) (Scalia, J., dissenting).

The City of Escondido has the authority under its police powers to allocate its general revenues to subsidize any favored groups it pleases. However, forcing one

small group of property owners to bear the full costs of such a program is an affront to basic concepts of equity. The issue is not whether the benefits of subsidies to coach owners are worth the costs but rather who should pay. "[T]he question at bottom is upon whom the loss ... should fall." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416. As this Court concluded regarding the governmental objective in *Nollan*, "[t]he Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. . . . [If California] wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 U.S. at 841. This conclusion is directly applicable to the case at bar. If the City of Escondido wants to transfer wealth to those individuals who occupy petitioners' land at a certain point in time, it is constitutionally required to pay for the subsidies out of general city revenues.

III

THE COURT BELOW ERRED IN NOT FINDING A PER SE TAKING IN THE UNCOMPENSATED TRANSFER OF AN INTEREST IN TITLE FROM ONE GROUP OF PRIVATE PARTIES TO ANOTHER

As established in the preceding section, the ordinance at issue in this case blatantly violates this Court's regulatory takings guidelines, regardless of whether it authorizes a permanent physical invasion of petitioners' property. Alternatively, it can be argued that it is unnecessary to subject measures such as this one to the regulatory takings tests since outright uncompensated transfers

of valuable property interests have been treated by this Court as *per se* violations of the Takings Clause.

A. An Uncompensated Transfer of an Interest in Title Is a Per Se Violation of the Takings Clause

One of the most consistent guideposts of this Court's takings jurisprudence has been a careful examination of the "character of the government action" challenged as a taking. *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. It is well known that, when the character of the challenged action can be likened to a permanent physical invasion of property, the measure will be characterized as a *per se* violation of the Takings Clause. *Loretto*, 458 U.S. at 426. In a less widely recognized line of cases, this Court has dealt similarly with enactments purporting to transfer an interest in title without compensating the owners.

The transfer of an interest in title (such as a servitude) has often been held to constitute a taking by this Court. For example, the City of Escondido's seizure of petitioners' servitude is remarkably similar to the governmental action in *Kaiser Aetna*, 444 U.S. 164. There, the federal government claimed that, because a property owner had connected a private pond to the navigable waters of the United States, the public had acquired a servitude granting common access to the owner's private property. This Court held that the attempt to seize such a servitude "goes so far beyond ordinary regulation . . . as to amount to a taking." *Id.* at 178.

Because the character of the government action in *Kaiser Aetna* is distinguished from ordinary regulation, commentators tend to refer to it as a physical invasion case. But in fact the pond owner did not object to the physical presence of boats on its pond. The whole purpose behind constructing the channel, after all, was to increase the ability of boats to use the pond. It was the government's attempt to seize a servitude entitling the public to use the pond *without paying the owner's yacht club fees* that was found to constitute a taking.

This closely parallels the situation in the case at bar where the City of Escondido has granted coach owners a marketable right to use petitioners' property without paying the owners' full price for that use. The only relevant distinction between *Kaiser Aetna* and the case at bar is that the City of Escondido has not seized a servitude *for the benefit of the public*. Rather, ownership of petitioners' servitude was transferred—by legislative fiat—to the private parties who happened to occupy mobile home pads at the time the ordinance was adopted.

Another case in which this Court struck down an uncompensated transfer of an interest in title is *Hodel v. Irving*, 481 U.S. 704. There, Congress attempted to transfer small common tenancy interests in land from the Indians who owned them to the tribe. *Id.* at 708-09. After going through the analysis for regulatory takings, this Court stated: "If we were to stop our analysis at this point, we might very well find § 207 constitutional. But the character of the Government regulation here is extraordinary." *Id.* at 716. Then, likening the case to *Kaiser Aetna*, the Court ruled that the uncompensated transfer of even these small residual interests (valued at as little as

five cents per annum) amounted to an unconstitutional taking. Thus, while not a physical invasion case, *Hodel* cannot properly be considered a regulatory taking case either. Instead, it falls into a third category of cases in which this Court has found a violation of the Takings Clause in the legislative transfer of an interest in title from one private party to another.

In *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), Congress adopted an amendment to the Bankruptcy Act intended to restrict the foreclosure of mortgages on farms during the Great Depression. Due to prevailing economic conditions, this measure had the effect of granting bankrupt farmers the right to redeem foreclosed-upon properties at less than the outstanding mortgage obligation or else to remain in possession of the property for five years at a reduced rate. *Id.* at 575-76. This Court invalidated the amendment as a taking because it transferred to the farmer an interest in property that belonged to the holder of the mortgage. *Id.* at 594-95, 601-02.

In *Louisville Bank*, as in *Kaiser Aetna*, the petitioner did not object to the physical presence of third parties on the property. After all, if Radford left Louisville Bank would have rented the farm to someone else. What comprised a taking was the creation of a servitude entitling Radford to remain on the property without paying the bank its full price.

A more recent case involving the transfer of an interest in title is *Nollan v. California Coastal Commission*, 483 U.S. 825. There a state agency required a property owner to convey an easement (a type of servitude) to the

state as a condition of issuing a building permit. Prior to deciding whether the conveyance could be required as a permit condition, this Court considered whether such a transfer could be accomplished by simple legislative fiat--as the City of Escondido has done in the case at bar. On that question, this Court held:

> "Had California simply required the Nollans to make an easement across their beachfront available to the public . . . rather than conditioning their permit . . . we have no doubt there would have been a taking." *Id.* at 831.

Like the plaintiffs in *Kaiser Aetna* and *Louisville Bank*, the Nollans were not complaining about the physical presence of people on their beach. The Nollans already freely permitted people to traverse their beach. *Id.* at 858 (Brennan, J., dissenting). It was the transfer to the public of a formal right to be there, as owners of an interest in the Nollans' title, that would have comprised a taking had a transfer by legislative fiat occurred.

B. The Mere Fact That Petitioners Are in the Rental Business Does Not Legitimize an Uncompensated Seizure of Their Property

The court below attached great significance to the fact that petitioners are not forced involuntarily to accept the occupation of their property, since they were already in the business of renting their property to others. *Yee*, 224 Cal. App. 3d at 1358. However, this fact in no way distinguishes the present case from the foregoing line of Supreme Court precedent regarding the seizure of an interest in title.

The California Court of Appeal sought to portray petitioners' taking claim as inconsistent with *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245 (1987), wherein this Court rejected a challenge to the Pole Attachments Act on a physical invasion theory.

It should first be noted that *Florida Power* did not discuss the rule that an outright transfer of an interest in title constitutes a taking. Nor can *Florida Power* be interpreted as a retreat from that rule since both *Hodel v. Irving* and *Nollan* were decided after *Florida Power*.

Furthermore, the facts of *Florida Power* have virtually no similarity to the case at bar. This Court declined to find a taking in *Florida Power* because "nothing in the Pole Attachments Act ... gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements." *Florida Power*, 480 U.S. at 251. In other words, *there was no transfer to cable companies of a right to occupy the power company's poles at reduced rent*. If a cable company decided to remove its cables from the poles, it had no rights in the poles to sell to another cable company. This contrasts sharply with the instant case where outgoing coach owners have been granted precisely this right. They say who will occupy the park owner's property next and can sell to the next tenant their right to pay below-market rent.

The Escondido ordinance has an impact on petitioners wholly unrelated to the normally foreseeable consequences of operating rental property. The city's regulations effectively reduce petitioners from the owners

of a fee interest in private rental property to mere caretakers of public housing. Eviction controls, rent controls, and vacancy controls have the combined effect of extinguishing the park owner's right to determine *whether* his property will be occupied, *who* may occupy it, and *what price* he will accept for a stranger to occupy it. As a final evidence of expropriation, the park owner is even deprived of the proceeds when a part of his property (the legislatively-created servitude) is sold. What the owners retain is, in essence, a modest salary from the government for their caretaking services in the form of the government-set rent. (They also retain, of course, full liability for any injuries on their property and the privilege of paying taxes.)

Clearly, the effect on property owners of an uncompensated transfer of an interest in title can be just as devastating as the authorization of a permanent physical invasion. This may be the reason why transfer of title cases are often equated with physical invasion cases by commentators. However, this Court's decisions in *Kaiser Aetna*, *Hodel*, *Louisville Bank*, and *Nollan* demonstrate that the Escondido ordinance violates the Takings Clause because of its uncompensated transfer of an interest in title, regardless of whether a physical invasion has in fact occurred. This conclusion is wholly unaffected by petitioners' prior decision to engage in the business of renting spaces in mobile home parks.

CONCLUSION

Petitioners have alleged that Escondido's ordinance transfers an interest in their property to occupants of their mobile home parks and that outgoing occupants are selling to others the right to occupy petitioners' property at a reduced rent. According to the complaint, the premium that incoming park residents are paying (in excess of the showroom value of the mobile home coach) represents the present value of the rents park owners are prohibited from charging. Reasonably enough, petitioners sought the opportunity to prove these allegations in court.

The California Court of Appeal, notwithstanding that the case came to it on demurrer so that all facts pled in the complaint must be presumed true, opined that new park residents are not really paying a premium for the right to pay less rent. The Court of Appeal asserted that this premium is somehow paid for the coach itself, even though identical coaches not situated on petitioners' property sell for substantially less. *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1352-53. As pointed out in the dissent, this reasoning illustrates the danger of judges relying on their own lay opinions rather than allowing factual questions to go to trial.

Petitioners have adequately pled the transfer of an interest in their property. According to the decisions of this Court discussed above, the legislative transfer of such an interest without compensation is a *per se* taking. The facts alleged by petitioners also establish a regulatory taking under an overwhelming line of authority stretching from *Pennsylvania Coal* to *Nollan*.

For the reasons stated above, it is respectfully submitted that this case should be remanded for trial so that, if petitioners' allegations are proved, the regulatory scheme at issue can be declared a taking.

DATED: November, 1991.

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In the Supreme Court of the United States

October Term, 1991

JOHN K. YEE and IRENE YEE, *et al.*,

Petitioners,

v.

CITY OF ESCONDIDO, a municipal corporation,

Respondent.

On Certiorari from the
California Court of Appeal

BRIEF OF AMICUS CURIAE THE APARTMENT ASSOCIATION OF GREATER LOS ANGELES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE.

The Apartment Association of Greater Los Angeles ("Amicus") is a nonprofit mutual benefit corporation founded in 1917 whose individual and organizational members are involved in offering residential properties for rent primarily in the County of Los Angeles, California. At present Amicus has approximately 27,000 members.

Since 1978, Amicus has been both legislatively and judicially involved in apartment rent control matters.

Amicus believes that the distinctions between mobilehome park rent control and apartment rent control are constitutionally insignificant and that, therefore, the decision of this Court may have a substantial impact on rent control laws applicable to apartment owners as well.

SUMMARY OF ARGUMENT.

The touchstone for Judge Kozinski's decisions in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied* 485 U.S. 940 (1988) and *Azul Pacifico v. City of Los Angeles*, ____ F.2d ____ (91 Daily Journal D.A.R. 13599) (9th Cir. 1991) is that under a mobilehome park rent control system without vacancy decontrol the mobilehome park tenant obtains a benefit which he or she can sell to the incoming tenant, whereas in ordinary apartment rent control no such monetary benefit is realized by the departing tenant.

However, from the perspective of the landlord, there is very little difference in the impact on the landlord from mobilehome park rent controls and from ordinary apartment rent controls. In either case, the landlord retains essentially the same rights and suffers the same detriments.

Since the Constitution protects property owners from governmental confiscation—and does not preclude tenants from realizing windfall profits—the fact that the mobilehome park owner's loss is transferred to a single tenant rather than being diffused among a series of tenants as with apartment rent control seems constitutionally irrelevant.

While there is a clear taking in the instant case, there is no consistent theory to distinguish this taking from many other rent ordinances applicable to ordinary

residential rental properties. Amicus suggests that the remedy is not to create an artificial distinction between mobilehome parks and apartments, but to provide a methodology for meaningful review of all rent control ordinances. Labeling the effect of the mobilehome park rent control as a "physical taking," with its heightened scrutiny, on the one hand and apartment rent control as "mere economic regulation" on the other hand, with virtually no scrutiny, does not recognize the reality of either the economics or the ordinances. Amicus submits that there is a continuum between the two end points of "physical taking" and "economic regulation" with, for the reasons stated herein, rent control falling toward the "physical taking" side. The degree of scrutiny of ordinances for a constitutional taking should be flexible and should take into account where on the continuum the ordinance in question lies.

Such scrutiny should include a close review of the alleged nexus between the burdens imposed by the various elements of the rent control law in question and those legitimate governmental purposes which may lawfully be imposed on individual landlords. Where the cost of any particular provision of a rent control law cannot justly be imposed on the landlords, the cost should be borne by the general public.

ARGUMENT.

I.

There Is No Constitutionally Significant Difference Between Mobilehome Park Rent Control And Apartment Rent Control.

An apartment landlord suffers virtually identical burdens from rent controls as does a mobilehome park owner. He cannot terminate any existing tenant except

for good cause, notwithstanding the terms of an existing lease. He is denied possession even after the expiration of a tenant's lease[1] and is required to accept less than fair market value for this dispossession. While technically an apartment landlord has more freedom in selecting the new tenant, in reality this freedom has little value and may even be a detriment.[2]

For example, in *Hall*, Judge Kozinski suggested that an ability to limit occupancy to smaller families was an economic benefit retained by apartment landlords. *Hall v. City of Santa Barbara*, *supra* at 1279, n. 23. However, such a practice would probably be illegal today under both title VIII of the United States Civil Rights Act (42 U.S.C. Section 3601 *et seq.*) and the California Unruh Civil Rights Act (California Civil Code Section 51.2).

In order to comply with the various fair housing requirements, most landlords reject only those tenants who do not meet the financial criteria established to

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[1]Manheim, *Tenant Eviction Protections and the Takings Clause*, 1989 Wisconsin L. Rev. 925, 993 (1989),

> Not only do all modern eviction laws confer on existing tenants rights approaching life tenure, but succeeding tenants will have the same rights, and so on, as long as the landlord chooses to rent the premises. The identity of the tenant may change over time, but that affects neither the duration nor the nature of the occupation.

[2]*Id.* at 997,

> However, the [*Hall*] court's concern for the landlord's ability to control the identity of tenants was overblown. This property right has waned in significance due to a plethora of statutory and judicial mechanisms which have arisen to restrict the landlord's discretion.

determine ability to pay rent.[3] However, use of these financial criteria for new tenants is not a benefit exclusive to apartment owners, as it is also allowed to mobilehome park landlords under California law.[4]

The fact that an apartment owner may have the right to keep the rental unit off of the rental market also does not create a constitutionally significant difference. In *Loretto*, the Court held that the taking was not defeated merely because the landlord might terminate his rental business when a tenant vacates or at any other time.[5]

Finally, the right to select new tenants in owner-occupied two or three-unit apartment buildings may have significant personal value, but most rent control laws exempt these buildings from the controls anyway.

In summary, an apartment landlord would usually prefer the mobilehome park situation—that a terminating tenant be obligated to find a new tenant. In that way, the owner could save not only the time and effort of finding a new tenant, but the potential loss of monthly income until a new tenant is found.

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[3]Use of these criteria was upheld in *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 278 Cal. Rptr. 614, 805 P.2d 873 (1991).

[4]California Civil Code Section 798.74.

[5]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n. 17 (1982).

II.

The Taking Of The Owners' Properties In Mobilehome Park Rent Control Is More Obvious Than In Apartment Rent Control, But Not More Real.

When the smoke had cleared after the adoption of the mobilehome park rent controls in *Hall* and *Azul Pacifico*, it could be clearly seen that the tenant was left holding the "stick" called the landlord's reversionary interest. With the obvious transfer of this "stick" from the owner to the tenant, Judge Kozinski applied the strict *Loretto*[6] standard of a "physical taking" rather than the "regulatory" standard of, for example, *Penn Central*.[7]

However, that particular stick is also taken by rent control laws from apartment owners. Why should not the *Loretto* standard or some similar review apply to them as well?

The distinction between mobilehome park rent control and apartment rent control is merely that the confiscatory effect of rent control on the mobilehome parks is more obvious, not more real. As stated in Epstein, *Rent Control And The Theory Of Efficient Regulation*, 54 Brooklyn L. Rev. 741, 759 (1988),

> Rent control is politically palatable and constitutionally allowable because it is a form of disguised confiscation. Once that confiscation is made explicit, the practice cannot survive criticism. When the tenant sells the landlord's reversion and pockets the landlord's money, the situation becomes clear enough for all to see. *Hall* embodies an unconstitutional rent control scheme, but no more so than any other.

[6] *Loretto v. Teleprompter Manhattan CATV Corp., supra.*

[7] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The California Court of Appeal below agreed with this logic, but reached the opposite conclusion. It agreed that, "[i]n both [apartment and mobilehome park] cases, however, the value 'taken' from the property owner is conceptually identical." *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1356, 274 Cal. Rptr. 551 (1990). However, rather than concluding that similar rent controls on apartments constitute a taking, the court concluded that therefore the mobilehome park rent control did not effect a taking.[8]

In light of the *Hall*/ *Yee* decisions, Amicus submits that when an outcome is so dependent upon the mere label given to the activity, the underlying legal principle giving rise to the distinction must be clearly articulated.

III.

Restrictive Rent Control Is Closer To A Physical Taking Than To Mere Regulation And Therefore Requires Closer Scrutiny.

It is, of course, too late in the day to argue that rent control ordinances are per se unconstitutional,[9] nor

[8] However, the California court felt constrained by prior California authority to hold that apartment rent controls did not effect a taking.

[9] As stated in *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988),

> Despite amici's urgings, we see no need to reconsider the constitutionality of rent control per se.

would Amicus make such an argument. On the other hand, merely labeling an ordinance "rent control" should not insulate it from constitutional review.[10] Whether a rent control ordinance is within the police power should be a different question from whether the ordinance effects a taking.

For example, surely a municipality could not solve its welfare problems by issuing entitlements to qualified, low-income persons authorizing them to simply take, without paying, whatever food and clothing they need from private retail stores, where the only recourse for the store would be to petition the government to allow the store to cease honoring such entitlements upon proof that to honor any further entitlements would result in the store's receipt of less than a constitutionally minimum return. Such a welfare scheme imposed entirely on the private food and clothing industry would clearly be a taking. Yet, there is no constitutional distinction between this hypothetical and many of the rent control laws now in effect, including the one at issue here.

Rent control is simply a wealth transfer from one group to another. Whether it thereby becomes closer to a taking or an economic regulation requires an examination of the justifications for other rate regulations. However, classical justifications for rate regulation are based on situations clearly distinguishable from rent control. First, there is presently no emergency justifying constitutional infringements. With the

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[10] *Id.* at 22 (Scalia, J., dissenting),

> The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation," which can disproportionately burden particular individuals.

exception of *Pennell v. City of San Jose*, *supra*, the previous rent control ordinances considered by this Court involved wartime emergencies. The Court upheld the controls on the ground that laws addressing such emergencies which are limited in time "to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." *Block v. Hirsh*, 256 U.S. 135, 157 (1921), quoted in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) (Rehnquist, J. dissenting from dismissal).

Second, public utilities with their concomitant governmental monopolies and other private activities involving property devoted to public use clearly justify a regulation of the rates charged by the utility or activity.[11] However, residential rental properties are neither of these.

Third, a common justification for rate controls is that the activity involves a monopoly or is approaching a monopoly. *FPC v. Texaco Inc.*, 417 U.S. 380, 397-98 (1974) (holding that federal regulation of the natural gas market was in response to the threat of monopoly pricing.) However, residential rental housing is not a monopoly nor anywhere near approaching a monopoly. In *Azul Pacifico v. City of Los Angeles*, *supra* at 91 Daily Journal D.A.R. 13601, Judge Kozinski held that mobilehome park owners do not enjoy a monopoly or even a near monopoly. Yet, the apartment residential rental market is far more diversified than the mobile-home park industry.

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[11] *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1988).

> It is, of course, settled beyond dispute that regulation of rates chargeable from the employment of private property *devoted to public uses* is constitutionally permissible. (emphasis added)

Fourth, otherwise unconstitutional regulation has been permitted where the activity is determined to be "noxious."[12] However, residential rental housing cannot be classified as a noxious activity.

Fifth, the justification for permitting broad police power authority in land use matters is based on the notion that such land use ordinances have burdens and benefits flowing both ways. There is thus a "reciprocity of advantage." An owner cannot point to the burdens and claim a taking while, at the same time, ignore the reciprocal benefits.[13] On the other hand, without any reciprocal benefits, a regulatory taking will more easily be found.[14] There is, however, no "reciprocity of advantage" at all for landlords in rent control legislation.

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[12] *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 491 (1987)

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

[13] *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal. 3d 508, 520, 125 Cal. Rptr. 365, 375, 542 P.2d 237, 246 (1975) (characterizing zoning as "not an arbitrary action depriving someone of property for the purpose of its use by the public or transfer to another: rather it involves reciprocal benefits and burdens.") *cert. denied* 425 U.S. 904 (1976).

[14] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Penn Central Transportation Co. v. City of New York, supra* at 139-40 (1978) (Rehnquist, J., dissenting). *See, also*, Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 Am. U. L. Rev. 297 (1990).

Sixth, landlords are certainly not the cause of any housing shortage. Of course, it may be debated back and forth as to whether rent controls effectively serve a legitimate public purpose in providing affordable housing, but the fact that they may serve a public purpose does not answer the question as to whether or not they effect a taking.

The only cogent rationale given for imposing rent controls on landlords is that landlords, while not causing the alleged rental housing shortage, do stand to profit from it.[15] However, this should not stop the constitutional inquiry.

For example, under this rationale, what is the justification of rent controls that do not permit rents to simply keep pace with inflation?[16] Modern rent control laws are enacted on the alleged basis of a shortage of rental housing and contain "rollback" provisions requiring that existing rents at the time of the enactment be "rolled back" to the rents in effect at some prior date specified in the ordinance. This date is selected, and its use justified, on the theory that the date selected was the last time when the rental marketplace was in

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[15] *See, Pennell v. City of San Jose, supra*, at 20-22 (Scalia, J., dissenting); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610-12 (1944) ("The primary aim of [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies.")

[16] United States Department of Housing and Urban Development, Report to Congress on Rent Control, at 9 (1991) ("The most severe ordinances now in place in the United States allow for rent increases that are well below inflation and do not permit vacancy decontrol.")

equilibrium.[17] However, once the rents have been rolled back to a period when the marketplace was in equilibrium, what is the constitutional justification for thereafter keeping the rent increases below the inflation rate?

Amicus respectfully submits that it is exactly these provisions in the Escondido ordinance which have created the vast majority of the rent control premium for the mobilehomes at issue in the present case. The cause of the problem before this Court is not the mobilehome park tenants' ability to sell their mobilehomes at rent control premiums. Rather the cause of the problem is a rent control law which has created this significant rent control premium by year after year after year forcing landlords to charge less and less rent in terms of real dollars. This problem is identical for mobilehome park owners and apartment owners.

Finally, rent control is a beguiling political tool. It creates a wealth transfer whose costs are imposed wholly on a small minority. The expense is entirely off-budget with no effect on the public purse. Whether rent control actually serves its alleged social purpose of providing affordable housing or whether it is merely a means for politicians to buy votes with other people's money, in either case it is the burdening of a minority by a majority which cries out for the heightened constitutional scrutiny

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[17] *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 166, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976) (stating that the rollback date is used "as a starting point for the fixing of maximum rents on the theory that it approximates the rent that would be paid in an open market without the upward pressures that the imposition of rent control is intended to counteract."). *See, also, Vega v. City of West Hollywood*, 223 Cal. App. 3d 1342, 1352, 273 Cal. Rptr. 243, 249 (1990).

enunciated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

IV.

The Guarantee Of A Constitutional Return Is Presently An Empty Protection.

Rent control laws have withstood facial attacks when it can be shown by their terms that an owner could receive a "just and reasonable return" thereunder. However, notwithstanding decades of rent control litigation, no court has provided any useful assistance as to what actually constitutes a "just and reasonable return" as required by the Constitution. It is an extremely complex issue requiring, as noted in *FCC v. Florida Power Corp.*, *supra* at 254 (Powell, J., concurring), "careful consideration of the relevant statute, the action of the regulatory commission, and a complex of other factors," whatever all this may entail.

While it may be economically feasible for Hope Natural Gas Co. or Florida Power Corp. to litigate this difficult question, it is not at all economically feasible for the average landlord to do so. Instead, landlords have no option but to wait and hope that this nebulous, undefined standard will someday be clarified so that they may meaningfully assert their constitutional rights. In the meantime, without effective judicial protection of the landlords' rights, municipalities will continue to push the constitutional envelope, enacting more and more stringent rent control laws and regulations until the courts finally enunciate the boundaries beyond which the municipalities may not go without the expediency of paying for it.

CONCLUSION.

Amicus respectfully requests the Court reverse the decision of the California Court of Appeal below. In its holding, Amicus requests the Court recognize that the constitutional infirmities of the Escondido Mobilehome Park Rent Control laws are not unique to either Escondido or to mobilehome parks and the Court hold that rent control laws will be closely scrutinized as to the relationship between their costs and the justifications whereby it is contended that such costs may be borne solely by the landlords.

Dated: November 27, 1991

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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on November 27, 1991, I served the within ***Brief of Amicus Curiae The Apartment Association of Greater Los Angeles in Support of Petitioners*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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INTEREST OF THE *AMICUS CURIAE*

The Institute of Real Estate Management of the National Association of REALTORS® ("IREM") is a professional society whose membership includes 9,000 individuals who are real property and asset managers in the United

This *amicus curiae* brief is submitted with the written consent of all parties filed with the Clerk of the Court.

States and Canada. Founded in 1933 by individuals concerned with establishing ethical and educational standards of practice for property management, the members of this professional not-for-profit organization manage on behalf of property owners in excess of $1.1 trillion in real estate assets, including over 200,000 mobile home spaces. IREM's members have met stringent qualifying standards in education, experience, and ethical conduct, and are designated as CERTIFIED PROPERTY MANAGERS.®

The activities of IREM and its membership as the managers and agents for property owners are inextricably dependent upon the vitality of the freedoms protected by the United States Constitution, including most centrally the rights of private ownership and control of private property. The scope of those rights *vis-a-vis* entrenchments or restrictions by units of government are at stake in this case.

More narrowly but also of great significance to IREM, the Court's decision on this issue will have a direct impact on the management operations and obligations of every property manager who may confront rent control over mobile home park pads specifically or rent control ordinances generally. Accordingly, IREM has a substantial interest in assuring the enforcement of the full protection afforded property interests by the Fifth and Fourteenth Amendments to the United States Constitution.

SUMMARY OF THE ARGUMENT

1. The California Court of Appeal erred by disregarding the holding of the United States Ninth Circuit Court of Appeals in *Hall* v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), that the combined effects of a municipal mobile home rent control ordinance and the State of California Mobilehome Residency Law result in a taking of the property of mobile home park owners for which compensation is required by the Fifth and Fourteenth Amendments to the Constitution.

2. The California Court of Appeal erred by not holding the Escondido Mobilehome Rent Control Ordinance to be constitutionally invalid because it deprives mobile home park owners of the economically viable use of their property without advancing any legitimate state interest, thus denying their right to substantive due process under the Fifth and Fourteenth Amendments to the Constitution.

ARGUMENT

I.

THE ESCONDIDO ORDINANCE, IN CONJUNCTION WITH CALIFORNIA'S MOBILEHOME RESIDENCY LAW, EFFECTS A TAKING OF MOBILE HOME PARK OWNERS' PROPERTY

A. The Taking of Private Property

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation to the property owner. *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1897). Even with the "just compensation" required by the Fifth Amendment, there can be no taking of private property in the absence of some "justifying [public] purpose." *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 241 (1984), quoting *Thompson* v. *Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937), citing *Missouri Pacific R. Co.* v. *Nebraska*, 164 U.S. 403 (1896). The California Mobilehome Residency Law and the City of Escondido Mobilehome Rent Control ordinance together operate to take private property without compensation and without a public purpose.[1]

In the exercise of its police power, a government body can place restrictions on a private owner's property, provided the restrictions satisfy two conditions. First, they must be within the scope of the state's police power, "substantially related to the advancement of the public

[1] This combination, as precedents from other jurisdictions will demonstrate, is not unique to California.

health, safety, morals or general welfare." *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 656 (1981), Brennan, J., dissenting.

Second, even if pursuant to a proper exercise of the police power, the restrictions must not go so far as to wholly deprive the owner of the use of the property or deny the owner "economically viable use of his land." *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 834 (1987), quoting *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980). If restrictions have this effect, and go beyond the permissible scope of the police power, the Constitution requires the property owner to be compensated. "If regulation goes too far, it will be recognized as a taking," in Justice Holmes' words. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

This Court's jurisprudence in the eminent domain context has divided such cases into two classes: (1) those involving "takings" by physical occupation; and (2) those involving "takings" by regulation.[2]

Physical occupation takings cases may involve occupation of the property directly by the sovereign or by a private party whose occupation is ordered, directed or permitted by the sovereign. *Id.* at 434-435. In any such case, the obligation of compensation is immediate, arising from the physical occupation of the property by someone other than the property owner. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982).

In regulatory takings cases, the value or usefulness of private property is either eliminated or diminished so as to constitute a taking of that property. In such cases, the

[2] *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982).

physical occupation of the property is not required. *See, e.g., Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-124, *rehearing den.*, 439 U.S. 883 (1978). The California law and Escondido ordinance at issue here, but by no means unique to this case, constitute such a taking.

B. Rent Control Ordinances

Rent control schemes have generally and consistently been recognized by this Court as within the permissible scope of the police power and not rising to the level of a regulatory taking. Thus such ordinances are sustained in the face of challenges alleging either they constituted a taking of private property requiring compensation or they did not materially and substantially advance a legitimate public interest. *See, e.g., Fisher* v. *City of Berkeley*, 475 U.S. 260 (1986); *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Block* v. *Hirsh*, 256 U.S. 135 (1921).

However, because of the manner in which the Escondido ordinance operates in synchronization with the California Mobilehome Residency Law, its effect is distinguishable from previous rent control practices upheld by this Court, and unlike those, it is constitutionally indefensible.

California's Mobilehome Residency Law regulates mobile home parks in the state. *Cal. Civ. Code* §§ 798-798.8. By restricting how mobile home park owners may terminate or refuse to renew a tenancy to only those limited reasons specified in the Law, all of which require proof of some tenant misconduct, California effectively grants tenants a permanent tenancy, absent such overt misconduct. *See Cal. Civ. Code* § 798.55(b).

The California law permits the tenant to transfer pad occupancy rights to a third-party purchaser of the tenant's mobile home. Further, it requires the park owner to accept the third-party purchaser as a successor tenant.[3] Thus, by law a California mobile home park tenant may sell the personal property, the home or unit, to a purchaser of his own choosing, thereby requiring the real property owner, the park owner, to enter into a lease with the purchaser.

The California law does not impose rent controls, nor does it require a "vacancy decontrol"[4] provision in local

[3] The successor tenant need only demonstrate the financial ability to pay rent and other charges, and that there are no other grounds to believe, based on other tenancies, that the purchaser will violate the park's rules and regulations. *See Cal. Civ. Code* §§ 798.73-798.74.

[4] "Vacancy decontrol" in a rent control ordinance permits renegotiation of lease terms, including rent increases, upon the termination of one leasehold and introduction of a new tenant. Vacancy control, therefore, refers to a rent control ordinance which precludes rent increases upon termination of a leasehold, either explicitly or by omitting termination or substitution of a new mobile home owner as tenant as a basis for a rent increase.

In the mobile home context, vacancy decontrol would permit lease term revisions upon the sale of a mobile home on-site in a rent-controlled park. The Escondido ordinance, like those before the courts in *Hall* v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), *Azul Pacifico* v. *City of Los Angeles*, 740 F. Supp. 772 (C.D. Cal. 1990), *aff'd*, 1991 U.S. App. LEXIS 26352 (9th Cir. 1991), and *Pinewood Estates of Michigan* v. *Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990), lacks vacancy decontrol. This feature of the ordinance is at the core of petitioners' challenge to the constitutionality of the ordinance, as it makes possible both the transfer of the park owners' property interest to the tenant and the tenant's transfer of that property interest to the purchasing, incoming tenant. Thus, the absence of vacancy decontrol is primarily responsible for the irrational effects of the ordinance in increasing rather than controlling or reducing mobile home costs for new tenants in rent controlled mobile home parks. This effect provides the basis for petitioners' due process challenge to the ordinance. *Infra* at 17-23.

rent control ordinances. If the law also required vacancy decontrol, while obliged to rent to persons thrust upon a park owner by a current tenant, the park owner would be free to charge new tenants the market rental price for the pad.

However, by the operation of local rent control ordinances which lack provisions for vacancy decontrol, including the ordinance adopted by Escondido, mobile home park owners are prevented from freely negotiating new rent terms with successor tenants who purchased their mobile homes from the existing tenants.

The distinctions from the apartment rent control context, and the reason for the ordinance's invalidity, were summarized by the United States Third Circuit Court of Appeals in *Pinewood Estates of Michigan* v. *Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990), involving a very similar combination of mobile home tenant control by state statute and a local mobile home rent control ordinance in New Jersey (898 F.2d at 355):

> Two significant differences exist between mobile home regulations now subject to the New Jersey rent control statute and the Barnegat Ordinance and the typical urban rent control. First, in urban apartment rent control it is the landlord who chooses, selects, and rents to the new tenants. No other party can sell the right to occupy the landlord's premises. Second, the tenant cannot occupy in perpetuity. Thus, the tenant does not acquire an inheritable right.

Like the New Jersey regulation in *Pinewood*, the Escondido ordinance, in conjunction with California's Mobilehome Residency Law, takes from the park owner and transfers to current tenants a property right belonging to the former and does so, essentially, in perpetuity.

C. The Invalidity of the Escondido Rent Control Scheme

Escondido's Mobilehome Rent Control Ordinance is subject to a finding of invalidity by this Court on two grounds. First, because the ordinance lacks a provision for vacancy decontrol and operates in conjunction with California's Mobilehome Residency Law, it creates a physical occupation of the park owner's property by tenants not of the owner's choosing. This results in a taking of the owner's property requiring the payment of compensation. The ordinance, however, does not provide for such compensation.

Second, because the ordinance fails to further any legitimate public interest within the scope of the sovereign's police power, its enactment and effect constitute a denial of substantive due process. The ordinance, like the building permit requirement found unconstitutional in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), amounts to an attempt to take private property without compensation and without a "justifying public purpose." *See Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 241.

1. The Impact of *Hall* v. *City of Santa Barbara*

Petitioners relied on the opinion of the United States Ninth Circuit Court of Appeals in *Hall* v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988). It is a case with facts very similar to those presented here. *Hall* involved a challenge to a similar local mobile home rent control ordinance lacking vacancy decontrol and operating in conjunction with the California Mobilehome Residency Law. In *Hall*, which like this case was appealed from a dismissal in the trial court, the Ninth Circuit held plaintiffs had stated a claim for an unconstitutional taking, and should be permitted to try the case on its merits.

On remand, the trial court found the operation of the two enactments did constitute a taking of the mobile home park owners' property, and ordered they be paid just compensation as required by the Constitution. *See Hall* on remand, attached as Exhibit A to Appellants' Brief in the California Court of Appeal. Thereafter, the reasoning of *Hall* was adopted and followed by the Third Circuit in *Pinewood*, and the United States District Court in *Azul Pacifico* v. *City of Los Angeles*, 740 F. Supp. 772 (C.D. Cal. 1990). On November 1, 1991, subsequent to the rulings in this case, *Azul* was affirmed by the Ninth Circuit. 1991 U.S. App. LEXIS 26352 (9th Cir. 1991).

In spite of these precedents, the trial court sustained Escondido's demurrer to the Complaint and dismissed the case. This dismissal was affirmed by the California Court of Appeal, which found the reasoning in *Hall* "unpersuasive." The Supreme Court of California denied Petitioners' Petition for Review, with two Justices dissenting from that denial. *Yee* v. *City of Escondido*, 224 Cal. App.3d 1349, 1354, 274 Cal. Rptr. 551 (1990), *review den.* 1991 Cal. LEXIS 353 (Cal. 1991). This Appeal followed.

Contrary to the suggestion of the California Court of Appeal that *Hall* and its analysis represent a departure from "traditional" takings analysis, *Yee*, 224 Cal. App.3d, at 1354, the *Hall*, *Azul* and *Pinewood* decisions are supported by substantial authority from this Court. Put most simply, these recent cases hold that, in combination, the rent control ordinances and the state statutes effect a taking by physical occupancy precisely analogous to that found by this Court in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

2. The Unconstitutional Basis of the Ordinance

Amicus respectfully proposes this Court adopt and apply to this and similar state/local takings the reasoning of the Ninth and Third Circuits, and conclude either that mobile home rent control ordinances which fail to include provisions for "vacancy decontrol" work a taking of the owners' property for which the Fifth and Fourteenth Amendments require just compensation or that they be declared unconstitutional.

This unconstitutional taking results from the interplay of the local ordinance and the state statute. A tenant in a mobile home subject to the two laws receives a near permanent right of possession of the leased pad. This property right in the tenant can be, and is, sold by the tenant to a third-party purchaser of the mobile home, and results in the sale by the tenant of the right to occupy that pad at the below-market rental mandated by the rent control ordinance. The result of the creation of this transferable and valuable property right is to take from the owner, and transfer to each current tenant, the separable element of the park owner's valuable real property right in the park and combine it with the tenant's personal property interest in the mobile home. Because this transfer is effected entirely by operation of the ordinance in the context of the state law, it constitutes a taking of the park owner's property requiring either compensation under the Constitution or a declaration that the rent control ordinance is unconstitutional.

D. Additional Errors of the California Court of Appeal

1. Introduction

Petitioners and other *amici* have presented this Court with precedent amply supporting the holdings of the *Hall*,

Azul and *Pinewood* cases and their conclusion that a taking is effected on the facts and law presented here. *Amicus curiae* IREM focuses the remainder of its brief specifically on the underlying errors in the opinion of the California Court of Appeal with the objective that this focus will assist the Court in resolving the narrow constitutional issue presented that mobile home rent control ordinances, such as Escondido's, which lack vacancy decontrol provisions, are unconstitutional. Upon such a holding, *amicus* urges the Court to remand this case for further proceedings to determine the compensation due Petitioners for the taking of their property, or a declaration that ordinances such as the Escondido ordinance are constitutionally invalid as depriving mobile home park owners of the due process of law guaranteed them by the Constitution.

2. Takings/Compensation

There are two fundamental flaws in the reasoning of the California Court of Appeal as to the proper understanding of the "takings" provision of the Fifth Amendment:

> 1) The Court of Appeal, focusing on whether the rent set by the Escondido ordinance was "fair and reasonable," failed to understand the basis of Petitioners' claim of a "taking"; and
>
> 2) The Court of Appeal failed to understand that a regulatory taking must also satisfy police power limitations to pass constitutional muster.

The California Court of Appeal simply failed to grasp, and thus failed to respond to, the fundamental economic nature of the Petitioners' claim. The court acknowledged the Escondido rent control ordinance "effects a transfer of value from landlords to tenants." *Yee*, 224 Cal. App.3d

at 1354. The "critical question" for the court was "Whether such a transfer can be justified by a rational governmental purpose, i.e., are the controlled rents fair and reasonable?" *Id.* Noting the mobile home park owners failed even to raise that question, the court then "assume[s] the rents provided for by the ordinance are fair," and therefore that "there is no 'taking.' " *Id.*

The problem with the California court's analysis is that the gravamen of Petitioners' complaint is not that the rents established by the Escondido ordinance fail to meet some abstract standard of fairness, but rather, that the ordinance, in conjunction with the California Mobilehome Residency Law, expropriates the mobile home park owners' right to realize one of the most important "sticks in the bundle of rights" which together constitute private property rights, i.e., the right to control access to and possession of the owners' property. This fundamental right has been taken from the owners and transferred to their current tenants.

In *Hall*, the court specifically addressed the conclusion that reasonable rent provisions eliminate a "taking" (833 F.2d at 1278):

> The city's argument that appellants are adequately compensated by the rents they receive is irrelevant to the determination of whether a taking has occurred. [citation omitted] Whether compensation is adequate is an inquiry separate from whether there has been a taking. In *Loretto*, for example, state law provided for compensation. The Court nevertheless determined that there was a taking through physical occupation. It left it to the state courts to determine whether the compensation provided was adequate.

The court's conclusion below that the failure to allege the rents are unfair eliminated the basis for the takings claim

made by the Petitioners simply missed the point. The California Court of Appeal may, perhaps, refuse to be influenced or controlled by the reasoning of *Hall*, *Azul* and *Pinewood*, but if it elects to dismiss the constitutional positions adopted by those cases, it must at least demonstrate that it has recognized and considered them.

In short, the California Court of Appeal's inability or refusal to recognize that Petitioners' takings claim was based on an effect of the ordinance separate from the level of permitted rent, kept it from even attempting to properly assess the nature of Petitioners' claims. It is the loss, essentially in perpetuity, of the owners' right to occupy the property, or to determine who may occupy it, that is the source of the taking in this case.

As the *Hall* court noted, "[T]he right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause." *Hall*, 833 F.2d at 1276, citing *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945). Similarly, in *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979), the Court held, "[t]he 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."

As this Court has recognized, once a physical taking is found, the property owner is entitled to compensation, without the need to analyze the extent of the taking or the degree of economic hardship it creates. "When faced with a constitutional challenge to a permanent physical occupation of real property, [this] Court has invariably found a taking . . . [w]ithout regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. at 427, and 434-35.

Pinewood, addressing claims nearly identical to those here, states (898 F.2d at 353):

> Here, there has been a permanent transfer of the appellants' possessory interests to each tenant to occupy a rent controlled pad. Thus, although the interest belongs to the appellants, the landlords, the effect of the law is to transfer the interest, without compensation, from the landlords to the tenants. Accordingly, a tenant may, by determining the purchaser of his mobile home, select the new tenant for the park and command a premium for the alienation of the right to occupy the pad at a controlled rent to the complete exclusion of the appellants. The combined impact of the statute and the ordinance operates to deprive the appellants of their possessory interest in the pad permanently.

Because it misapplied applicable takings jurisprudence, the California court failed to recognize that there had been a physical taking of Petitioners' property, regardless of compensation, a separate issue.

Petitioners and *amicus* need not attack *per se* the constitutional validity of rent control ordinances in general. Rather, their assertions are specifically directed at the Escondido ordinance's failure to include a provision for vacancy decontrol. It is this aspect of the ordinance which, in the statutory context, specifically creates the unconstitutional taking of which the mobile home park owners complain.

Because Escondido's ordinance lacks vacancy decontrol, a departing tenant who sells the personal property—the mobile home on the real property of the owner—at a park subject to the ordinance is able to realize a premium price for the personal property. This premium is related not to the mobile home, but to its location on the pad of a rent-controlled mobile home park. As the *Azul* and *Hall*

courts made quite clear, the amount of this premium is essentially the difference between the controlled and market rental levels, as slightly affected by the cost of moving the mobile home from a controlled to an uncontrolled location. "[T]he vacancy-control premium that represents the property right transferred from landlord to tenant is equal to the present value of the difference between the controlled rent and the market rent." *Azul*, 1991 U.S. App. LEXIS 26352 at *20.

Moreover, while this case comes to the Court from a dismissal, with no record to support these economic contentions, both *Hall* on remand and *Azul* have produced the evidence to support them. As the Ninth Circuit observed in *Azul*, "what was only a theory in Hall was found as fact by the district court." *Id.*, at *2. At the *Azul* trial, the city's expert did not deny that the absence of vacancy decontrol did, in fact, create a substantial premium attributable solely to that factor. The Ninth Circuit noted, 1991 U.S. App. LEXIS 26352 at *4-*5:

> In fact, both the plaintiff's and the defendant's experts agreed that there was a substantial premium paid on coaches in rent-controlled parks—they just calculated the amount differently.

Hall and *Azul* recognize, as the Court of Appeal did not, that there is a taking which rises to constitutional dimensions, in the form of a determinable premium taken from the owner and transferred to the tenant by the operation of the ordinance when synchronized with the California law.

While failing to respond substantively to the underlying basis for Petitioners' takings claim, the California Court of Appeal did attempt to undermine the foundation of *Hall* as authority by asserting that *Loretto*, on whose authority *Hall* rests, was severely limited by this

Court in *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), decided, as the Court of Appeal noted, "six months after *Hall*." *Yee*, 224 Cal. App.3d at 1357.

However, that reliance on *Florida Power* as undermining *Hall* or *Loretto* is misplaced. *Florida Power* made clear that it did not involve a "physical occupation by one not chosen by the owner." *Florida Power*, 480 U.S. at 250. Contrary to the California court's position that "[n]othing [in the ordinance] requires [mobile home park owners] to rent their property to mobile home owners," the fact is that mobile home park owners are expressly prohibited by California's Mobilehome Residency Law from rejecting as tenants buyers of on-site mobile homes thrust upon them by the departing tenants, other than for narrowly specified reasons concerning prior violations of park rules or demonstrated inability to pay rent.

In this context it should be beyond any degree of caviling that the effect of the statute is precisely that of requiring the mobile home park owners to rent to those not of their selection, coupled with the ordinance's denial of compensation for that statutory taking, and thus to bring the ordinance precisely within the question reserved by the Court in *Florida Power*, the applicability of *Loretto* in the context of coerced, rather than voluntary, contracting.

This Court should declare the Escondido ordinance to be a taking for which compensation is constitutionally required.

II.

THE ESCONDIDO ORDINANCE DEPRIVES PETITIONERS OF DUE PROCESS OF LAW

The California Court of Appeal failed to apply the proper standard of judicial scrutiny to the Escondido Mobilehome

Rent Control Ordinance in the context of the California Mobilehome Residency Law. To be constitutionally valid, the ordinance must "substantially advance a legitimate state interest." *Nollan* v. *California Coastal Commission*, 483 U.S. at 841. Because the Ordinance fails to meet this test, it denies Petitioners due process of law under the Fifth Amendment as applied to states and municipalities by the Fourteenth Amendment to the Constitution.

This second fundamental flaw in the court's analysis is revealed in its acknowledged failure to understand in rejecting *Hall*, "Why the existing tenant's ability to 'monetize' the future rent control savings and recapture it from later tenants when the mobile home is sold is somehow critical to the takings analysis." *Yee*, 224 Cal. App.3d. at 1356. The California court concludes, "[i]f an owner's property has been taken by the government, it should be of no constitutional consequence to whom the property has been given." *Id.*

There are two glaring errors in that statement, either of which mandates reversal. First, the current tenant's ability to "monetize" the premium involved by transferring the right to lease a rent-controlled pad is significant because it demonstrates the possessory nature of the tenant's interest created by the ordinance, showing it to be the sort of physical taking which always gives rise to a right to compensation. As the Ninth Circuit explained in *Azul*, (1991 U.S. App. LEXIS 26352 at *36):

> The right of the tenant to transfer the property right created by the vacancy control provision distinguishes the physical occupations in this case and in *Hall* from rent control regulations that do not effect a taking. Unlike other types of rent control, mobile home vacancy control permits the outgoing tenant to preserve the benefits of rent control even after he no longer is renting. *Hall*, 833 F.2d at 1279. It is this ability of the tenants to monetize their rights that transforms the state's traditional power to regulate landlord-tenant relationships through rent control into a physical taking requiring compensation under the Fifth Amendment.

Second, because neither the taking authority nor the police power can be constitutionally exercised except in pursuit of a legitimate public use or interest, it is of fundamental constitutional consequence to whom the property has been given.

This Court's holdings make this second principle abundantly clear. The broadest reading by this Court of the "public purpose" limitation on the taking clause acknowledged that "[e]ven a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. . ." is prohibited by the Constitution. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984). Thus, the California court's assertion that there can be no "constitutional consequence" to a transfer of the Petitioners' property to mobile home park tenants is simply untenable and erroneous.

As *amicus* has demonstrated, the effect of the Escondido ordinance coupled with California law is to take from the mobile home park owner and transfer to a current tenant the right to determine, essentially in perpetuity, continuing tenancy at the mobile home park without compensation for the taking. Instead, the ordinance permits tenants to collect monetary premiums from those to whom they transfer their continuing tenancy. It does so, moreover, without in the least serving any conceivable legitimate state interest which could justify the validity of the ordinance.

Assuming *arguendo* that the ordinance (like most rent control ordinances) is intended to relieve perceived unfairly high rentals based on some monopoly or near-monopoly allegedly enjoyed by mobile home park owners, and to assure "fair and reasonable," albeit "below-market," rents for such pads, there is simply no basis on which to conclude that policy is furthered by Escondido's ordinance. To the contrary, there is substantial evidence demonstrating the ordinance contradicts this intended purpose.

The purposes, as set forth by Respondent, of Escondido's ordinance are (Respondent's Brief in Opposition to the Petition for Certiorari at 27):

> "[T]o remedy an inequitable market situation caused by the scarcity of mobile home spaces by protecting mobile home owners from unreasonable space rental increases therefore protecting the home owners' investments, while also providing park owners with a just and reasonable return on the park owners' investment."

All available evidence and common sense, however, demonstrate that an ordinance like Escondido's, which imposes rent control and lacks vacancy decontrol, works to prevent, rather than to further, just these purposes.

There appears to be little if any dispute about the following:

1. Escondido claims the fundamental purpose of the ordinance is to protect mobile home owners from unreasonable space rental increases;

2. The effect of the ordinance, however, lacking vacancy decontrol and operating in the context of the restrictions imposed by the California Mobilehome Residency Law, is to substantially increase the purchase price paid to tenants who sell mobile homes located in rent-controlled mobile home parks;

3. The purchase price premium paid by individuals purchasing a mobile home in rent-controlled parks is directly related to the difference between the market rent which would be paid, absent rent control, and the rent set by the rent control authority. As *Azul* stated, the premium "is equal to the present value of the difference between the controlled rent and the market rent." 1991 U.S. App. LEXIS 26352 at *19; and

4. Because the ordinance in effect transfers the right to "sell" access to the rent-controlled mobile home space from the park owner to the current tenant, the premium paid by incoming tenants is paid to the current tenant and not the park owner.

Azul and *Hall* addressed the public interest claims of Escondido-type mobile home rent control ordinances. As the Court of Appeals observed in *Azul*, "[w]hat was only a theory in *Hall* was found as fact by the district court." 1991 U.S. App. LEXIS 26352 at *2.

With respect to the public interest allegedly being furthered by the rent control ordinance in *Azul*, the *Azul* court wrote in response to the City's argument that the ordinance protected tenants (1991 U.S. App. LEXIS 26352 at *17-*18):

> We have previously recognized in the substantive due process context that this is a valid basis for governmental regulation of the landlord-tenant relationship [citation omitted]. But the Supreme Court has held that the relationship between the means and the ends must be closer for purposes of takings clause analysis. *Nollan* v. *California Coastal Commission*, 483 US 825, 834-35 & n.3 (1987) . . . We interpret *Nollan* as holding that in cases brought under the takings clause we must undertake a close analysis of the means of protecting the asserted governmental interest.

Pursuant to that mandate, *Azul* examined the ordinance's purposes in light of the alleged governmental interest. The court found that the ordinance did not advance its stated goals, concluding that it did not reduce or hold down the costs for mobile home park tenants. Rather it merely transferred higher rental prices from mobile home park owners to existing tenants in the form of inflated mobile home prices. *Azul*, 1991 U.S. App. LEXIS 26352 at *19-*20:

> The vacancy control ordinance does nothing to protect mobile home buyers from the rigors of the marketplace. Instead it transfers the value of rent-controlled space—$20,880 per pad—from the mobile park landlord to the tenant. We are unable to see how this transfer of wealth from one group of citizens to another can serve any rational governmental purpose.

In other words, the effect of the ordinance is to very substantially increase the cost to an incoming tenant of a mobile home because it sits on a rent-controlled pad. The incoming tenant pays a substantially higher rate than the departing tenant, not as rent, but in the form of the premium paid to the departing tenant for the sale of the mobile home. This premium is based not on the value of the mobile home, but on the basis of its location in a rent controlled mobile home park. This "rent" is paid up front, as an additional cost of the mobile home, and, worst of all from a constitutional perspective, it is paid to the wrong person. It is paid not to the owner of the pad, but to the seller of the mobile home. It is this "transfer" of "rent" which, most graphically, is the taking involved in this case.

Thus, with respect to the municipality's avowed purpose of protecting tenants from unreasonable rental levels, *Azul* concluded that because the ordinance lacked a vacancy

decontrol provision, it completely failed to further this stated end. Nevertheless *Azul* concluded that the ordinance, and specifically its lack of a vacancy decontrol provision, served the legitimate governmental purpose of "protect[ing] existing tenants from being forced to sell their coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach. *Azul*, 1991 U.S. App. LEXIS 26352 at *20.

However, a closer look at this "purpose" indicates that it will not support the absence of vacancy decontrol. Contrary to the conclusion of *Azul*, the owner of a mobile home park under rent control including a vacancy decontrol provision would have precisely the opposite incentive from that hypothesized in *Azul*. Given an ordinance with vacancy decontrol, such an owner would rationally set rents for new tenants who have purchased units from existing tenants at a sufficiently low rate of increase to encourage such sales. Only through such resales could the park owner raise rents without petitioning the rent control board. As this analysis shows, the *Azul* court's "purpose" for the absence of vacancy decontrol evaporates and cannot support such an ordinance. The effect of such ordinances is in fact contrary to their declared purposes and, therefore, violative of the mobile home park owners' right to substantive due process under the Fifth and Fourteenth Amendments.

CONCLUSION

Rent control ordinances have regularly survived "takings" and other constitutional challenges. This Court has declined invitations to reconsider the constitutionality, *per se*, of rent control measures. While *amicus* believes that there are good reasons for the Court to reconsider this issue, this is neither requested by Petitioners nor necessary for the Court to declare unconstitutional mobile home rent controls without vacancy decontrol in the context of state laws mandating tenancy continuation rights on owners.

Amicus curiae IREM respectfully requests that this Court reverse the California Court of Appeal and remand this action to the California Superior Court for further proceedings consistent with a finding that the Escondido Mobilehome Rent Control Ordinance is unconstitutional and must be either declared invalid as violative of the substantive due process rights of mobile home park owners, or be construed as effecting a taking of the property of the mobile home park owners for which they are constitutionally entitled to just compensation.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1991

JOHN K. YEE, *et al.*,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

On Writ of Certiorari To The Fourth Appellate District, Division One, Court of Appeal For the State of California

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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No. 90-1947

JOHN K. YEE, *et al.*, *Petitioners*,

v.

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ON WRIT OF CERTIORARI TO THE
FOURTH APPELLATE DISTRICT,
DIVISION ONE, COURT OF APPEAL
FOR THE STATE OF CALIFORNIA

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with

over 120,000 members and supporters nationwide. While WLF engages in litigation and administrative process in a variety of substantive areas of the law, WLF devotes considerable resources to cases dealing with property rights in general and the Takings Clause of the Fifth Amendment in particular. WLF has filed briefs on these issues in this Court and lower courts, including cases on rent control. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986).

The Allied Educational Foundation (AEF) is a non-profit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including and law and economics, and has appeared before this Court as amicus on a number of occasions.

Both WLF and AEF believe that they can provide a broader perspective to this case and the issues presented which will assist the Court in adjudicating the merits of this case. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this Brief.

STATEMENT OF THE CASE

On July 7, 1988, a mobilehome rent control ordinance became effective within the City of Escondido for all mobilehome parks. The Ordinance provides, inter alia:

> Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986. . . . No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board [the Mobilehome Park Rental Review Board of the City of Escondido].

Escondido Municipal Code, Article V, § 29-103. There is no provision in the Ordinance for adjustment of the rental to fair market value when a tenant vacates the leased property. (*See* Respondent's Brief in Opposition to Certiorari, Appendix A-1 - A-3). The absence of "vacancy decontrol" means that the existing rental obligation carries over to the new tenant.[1]

The operation of the Escondido Ordinance must be viewed in connection with the California Mobilehome Residency Law (Calif. Civ. Code §§ 798 et seq.). The state law severely limits the grounds upon which a mobilehome tenancy may be terminated or not renewed. Calif. Civ. Code §§ 798.55 & 798.56. As a consequence, tenancies on a month to month basis or for a specified term are, in effect, abolished for mobilehome parks. Of course, the tenancy may be terminated by the voluntary decision of the tenant. Calif. Civ. Code § 798.59.

The Escondido Ordinance operates in combination with the California Mobilehome Residency Law to guarantee tenants a continuing lease at a controlled rent for the duration of the tenancy. Because there is no provision for any rental adjustment when a tenancy is terminated, a selling tenant may charge a premium on the sale of a mobilehome coach in relation to the extent that the controlled rent is lower than the fair market rental value of the mobilehome park space.

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1 *See* Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 412, 448-49 (1988).

Petitioners John K. Yee and Irene S. Yee, owners of two mobilehome parks in the City of Escondido, filed an action under 42 U.S.C. §§ 1983 et seq., alleging that the mobilehome rent control ordinance enacted by the Respondent City of Escondido constituted a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution, as well as under the California Constitution, Article 1, Section 19. They sought declaratory and injunctive relief against further enforcement of the ordinance, and attorneys' fees under 42 U.S.C. § 1988 and Cal. Civ. Proc. § 1036.

The Respondent filed a demurrer and a motion to strike. The demurrer was sustained by the Superior Court for the County of San Diego without leave to amend and action was dismissed by the Court. The Yees appealed this decision to the California Court of Appeal, Fourth Appellate District. Pursuant to stipulation of the parties, the Yees' appeal was consolidated on appeal with other cases challenging the Escondido Ordinance. (*See* Respondent's Brief in Opposition to Certiorari, pp. 7-8, n. 6). The Court of Appeal affirmed the Superior Court decision. The California Supreme Court denied a Petition for Review.

On October 15, 1991, this Court granted certiorari with respect to Questions 1 and 2 raised in Petitioner's Petition for Certiorari. ___ U.S. ___, 112 S.Ct. 294 (1991).

This *Amici Curiae* Brief will address the following two questions:

1. Does the Escondido Ordinance constitute a taking under the Fifth and Fourteenth Amendments by permanently authorizing the occupation of property and thereby causing the transfer of an interest in property from the owner to a third party, without payment of just compensation?

2. Does the Escondido Ordinance "substantially advance legitimate state interests" or does it "den[y] an owner economically viable use of his land"?[2]

SUMMARY OF ARGUMENT

When government authorizes the permanent physical occupation of property, this Court has readily found a taking, "without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). The Escondido Ordinance, operating in combination with the California Mobilehome Residency Law (Calif. Civ. Code §§ 798 et seq.), authorizes the taking of economic benefits from the park owner by a tenant who is entitled to occupy the property in perpetuity.

Under the California Mobilehome Residency Law, the park owner may not terminate a lease or refuse to renew same so long as the tenant pays the rent and reasonable expenses and avoids bad behavior. Calif. Civ. Code §§ 798.55 & 798.56. When the tenant decides to sell the mobilehome coach, the park owner may not require the removal of the coach from the park except under very limited circumstances. Calif. Civ. Code § 798.73. The park owner may not ordinarily refuse approval of the new purchaser as a tenant. Calif. Civ. Code § 798.74. The practical effect of these provisions is to allow the present tenant to transfer the possessory interest in the mobilehome space to a third party without renegotiation of the terms and conditions of the lease.

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[2] *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). *Amici* have made the assumption that this is the proper formulation of the second question certified for consideration in this case.

Against this background of state law, the control of rents by Respondent constitutes a permanent transfer of economic interests from the park owner to the current tenant. Where the benefit of renting the mobilehome space at a less than fair market rate is coupled with the perpetual occupation of the property by the tenant, there is a physical taking.

The lack of vacancy decontrol exacerbates the effect of the Escondido Ordinance. Because the rent for the mobilehome space is not decontrolled upon a termination of the tenancy, a windfall inevitably accrues to the vacating tenant. The sale price of the coach will reflect the benefit of a rent controlled space. An unregulated sale of the coach will undermine the reason for rent control because the new tenant will pay a higher price for the mobilehome coach and thereby capitalize a portion of the rent.

The actions of the Respondent are therefore well within the holding of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This conclusion is supported by the decisions of the Ninth Circuit in *Azul Pacifico, Inc. v. City of Los Angeles*, ___ F.2d ___, 1991 WL 224528 (9th Cir. 1991) and *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988) and the decision of the Third Circuit in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990).

The rejection of the *Hall* and *Barnegat* analysis by the California Court of Appeal in this case was erroneous because the Court made factual assumptions not supported by the evidence. This was particularly inappropriate for a decision on the pleadings. The lower court also erred in concluding that subsequent decisions of this Court had undermined the rationale of *Loretto*, heavily relied upon by both *Hall* and *Barnegat*. A careful reading of the subsequent

decisions discloses, however, that this Court had not repudiated *Loretto*. It has simply refused to extend the *Loretto* holding to non-physical takings.

As a second ground for decision in this case, *Amici* contend that the Escondido Ordinance does not "substantially advance legitimate state interests" and it "denies an owner economically viable use of his land." *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

The principal justifications for rent control are to protect mobilehome owners from unreasonable space rental increases and to protect the owner's investment in the mobilehome coach. Although the protection of consumer welfare if a legitimate end, the means used in this case do not "substantially advance" the governmental interest. Regulation of rents without regulation of the resale of mobilehome coaches allows the current tenant to reap the economic benefit of future rent control. In fact, the means used by Respondent are counterproductive to its own asserted end.

The Ordinance is underinclusive because it does not regulate the resale of mobilehome coaches in order to protect consumers from "unreasonable" increases in the cost of mobilehome housing. Protection of the tenant's investment in the mobilehome coach cannot justify the lack of vacancy decontrol because it gives the seller more than just protection for investment. It gives the seller a windfall. If the justification is articulated as protecting tenants in mobilehome parks with limited incomes, the failure to decontrol the rent when such tenants terminate their tenancy indicates that the Ordinance is overinclusive as well. The means used by the Ordinance therefore do not "substantially advance" the interest asserted by Respondent.

ARGUMENT

I. The Escondido Ordinance Constitutes a Permanent Physical Taking of Petitioners' Property.

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." This provision is applicable to the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). The purpose of this guarantee is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See also *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n. 4 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

Although this Court has acknowledged that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty" (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123 (1978)), several factors have been identified. These include the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. *Id.* at 124.

When the character of the action involves a physical intrusion by government, this Court has stated that a "taking" may be more readily found. *Id.* Indeed, if the intrusion amounts to a permanent physical occupation of property, the "cases uniformly have found a taking to the extent of the occupation, without regard to whether the

action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). Thus, a permanent physical intrusion by the government is not simply one factor in resolving whether the action constitutes a taking, it is determinative. *Id.* at 426.

A. The Escondido Ordinance Combines With the State Mobilehome Residency Law to Permanently Transfer an Interest in Property from the Owner to a Person Occupying the Property in Perpetuity.

The first question therefore is whether operation of the Escondido Ordinance amounts to a permanent physical occupation of the Petitioners' property. It must be conceded at the outset that the Ordinance does not, in and of itself, authorize a physical taking. However, when viewed in connection with state law regarding mobilehome tenancies, its effect is to authorize the taking of economic benefits from the owner by a tenant who is entitled to occupy the property in perpetuity.

The California Mobilehome Residency Law severely limits the grounds upon which a landlord may terminate or refuse to renew a lease. Calif. Civ. Code § 798.55. The park owner may terminate a tenancy only in the event of (1) failure to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after receiving a notice of noncompliance from the appropriate governmental agency; (2) conduct by the mobilehomeowner or resident, upon the park premises, which constitutes a substantial annoyance to other mobilehomeowners or residents; (3) conviction of the homeowner or resident for prostitution or a felony controlled substance offense on account of an act within the

mobilehome park, except that the tenancy may not be terminated if the person convicted permanently vacates and does not subsequently reoccupy the mobilehome; (4) failure of the homeowner or resident to comply with a reasonable rule or regulation which is part of the rental agreement; (5) nonpayment of rent, utility charges, or reasonable service charges, except that a tenant may cure nonpayment within three days after receiving written notice; (6) condemnation of the park; or (7) change in the use of the park. Calif. Civ. Code § 798.56. The practical effect of these limitations is to make the mobilehome tenancy perpetual so long as the rent is paid and the tenant behaves.[3]

When the tenant decides to sell the mobilehome coach, the park owner may not require the removal of the coach from the park except under very limited circumstances. Calif. Civ. Code § 798.73. The park owner may require prior approval of the purchaser, but such approval cannot be withheld if the prospective tenant has the financial ability to pay the rent and charges of the park, unless there is reason to believe, on the basis of the purchaser's prior tenancies, that

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3 *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1277 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988).

Because the Superior Court below determined that Petitioners' complaints failed to state a cause of action as a matter of law, the complaints must be viewed in the light most favorable to the Petitioners and their allegations are to be taken as true. 5A C. Wright & A. Miller, Federal Practice & Procedure § 1357, at 304 (2d Ed. 1990). As this Court has stated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957):

> In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

"he or she will not comply with the rules and regulations of the park." Calif. Civ. Code § 798.74(a). The practical effect of these provisions is to allow the present tenant to transfer the possessory interest in the mobilehome space to a third party without renegotiation of the terms and conditions of the lease.

With these provisions of state law serving as the legal landscape against which the Escondido Ordinance operates, the control of rents constitutes a permanent transfer of economic interests from the park owner to the current tenant. This occurs in two ways. The first is the benefit of renting property at a rate less than the fair market rental rate. A general power to convey this benefit to tenants is within the recognized police power "to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). But where this benefit is coupled with the perpetual occupation of the property by the tenant, it amounts to a physical taking. The *Loretto* Court was careful to distinguish its holding from the general rent control cases:

> In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. . . . So long as [the rent control regulations] do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.

Loretto, 458 U.S. at 440. The Escondido Ordinance acts in concert with the state mobilehome residency law to achieve precisely this prohibited result.

The second transfer of property resulting from Escondido Ordinance is the ability of the current tenant to realize the future value of the less than fair market rental rates when such tenant vacates the leased premises. Although not inherent in rent control generally, this second benefit is the inevitable result of the Escondido Ordinance. Because the rent is not decontrolled[4] upon the vacation of the premises on account of a sale of the mobilehome coach, a windfall will accrue to the first tenant. The sale price of the coach will inevitably reflect an amount capitalizing the difference between future fair market rent and future controlled rent.[5] To regulate rents in mobilehome parks, but not the resale of mobilehome coaches, inevitably allows the current tenant to reap the economic benefit of future rent control. The consequence of allowing the current tenant to realize the benefit of reduced future rents is that the chief reason for rent control (less than fair market rental rates) is thereafter lost to subsequent tenants because they will have to pay the difference in the form of a higher sales price for the mobilehome coach.

The Escondido Ordinance, when operating against the background of the state mobilehome residency law, therefore constitutes a taking because there is a permanent transfer of interests in property from the owner to another party who is entitled to occupy the property in perpetuity.

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4 There is no provision in the Escondido Ordinance for an adjustment of rent on account of the termination of a mobilehome tenancy and vacation of the leased premises. *See* Escondido Municipal Code, Article V, § 29-103(g). (Respondent's Brief in Opposition to Certiorari, Appendix A-1 - A-3).

5 *See, e.g.*, Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 425, 430-32, 447-48 (1988).

The Ordinance is well within the prohibition articulated by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). If there is a permanent physical occupation of property, authorized by the government, then there has been a taking. *Id.* at 441. The fact that the occupant is a third party and not the government is of no significance. *Id.* at 432 n. 9. The inability of the landlord, however, to terminate, refuse to renew, or reject a new tenant, when combined with the lack of vacancy decontrol, are very significant. This underscores the fact that the physical intrusion in this case is not temporary, but effectively permanent.

The right to choose who might occupy the property has been transferred to the current tenant. As underscored by this Court in *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), the right to exclude others is "one of the most essential sticks in the bundle of right that are commonly characterized as property." This is a fundamental attribute of ownership of property, long recognized in the common law. *See, e.g., Eaton v. B.C. & M.R.R.*, 51 N.H. 504 (1872). Recognition of a taking in this case would be well within established precedent based upon a clear textual commitment in the Fifth Amendment.

B. The Circuit Courts of Appeal Have Found a Taking Under the Same Circumstances as Exist in This Case.

The only two Circuits to address this precise issue have both held that rent control without provision for adjustment when a vacancy occurs constitutes a permanent physical occupation by the tenant. *See Azul Pacifico, Inc. v. City of Los Angeles*, ___ F.2d ___, 1991 WL 224528 at 4 (9th Cir. 1991); *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347, 353 (3d Cir. 1990); *Hall v.*

City of Santa Barbara, 833 F.2d 1270, 1276 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988).

The leading case is *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1276 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988). In *Hall*, the Ninth Circuit held that the plaintiff had stated a cause of action for an uncompensated taking on the basis of the combined operation of a local mobilehome rent control ordinance and the California Mobilehome Residency law:

> Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a faction of what it is worth in rent; and that this interest is transferable, has an established market and market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in *Loretto*.

Id. at 1276. The *Hall* Court observed that the effect of the law is to give tenants a lease for an indefinite period. The right to occupy property in perpetuity is a right normally ownership with ownership. It is also the type of property interest protected by the Takings Clause. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967). Not only is the right to occupy indefinitely transferred, but so is the right to decide who will live on the property in the future. *Hall*, 833 F.2d at 1276.

Hall also recognized the second type of taking discussed above. The absence of vacancy decontrol allows the current tenant to realize the profit from future control of rent. This

type of taking is even more extreme because it is divorced from any valid purpose that rent control could possibly serve. The *Hall* Court concluded:

> [B]ecause of the way the ordinance is alleged to operate, the tenant is able to derive an economic benefit from the statutory leasehold by capturing a rent control premium when he sells his mobile home. In effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use, whether or not he continues to be a tenant. If the Halls' allegations are proven true, it would be difficult to say that the ordinance does not transfer an interest in their land to others.

Id. at 1276-77. The Court rejected the argument that the transfer was not permanent because the ordinance might someday be repealed. "A government taking can always be undone if the government so chooses. That has never defeated a taking claim." *Id.* at 1277. It also discounted the fact that a tenancy could be terminated for cause. The tenant's continuing right to possession is essentially at the will of the tenant, not the landlord. *Id.*

Hall's recognition, at the pleading stage, of a cause of action for a compensable taking was supported by the subsequent factual findings of the United States District Court in *Azul Pacifico, Inc. v. City of Los Angeles*, 740 F.Supp. 772 (C.D. Cal. 1990). In *Azul Pacifico*, the District Court found that mobilehome park owners effectively cannot evict tenants, and they cannot charge market rent. *Id.* at 775-76. It should be noted that the Los Angeles ordinance was not as violative of the property owner's rights because it at least allowed for a maximum

increase of ten percent upon the termination of a tenancy. This still was not enough to avoid a taking. *Id.* at 776. The District Court also found that the vacancy controls operated to transfer a property right from the park owner to the tenants. There was expert testimony which established that coaches in rent-controlled parks sold for considerably more than in parks where market rents prevailed, even after accounting for other variables such as location and amenities. The plaintiff's expert calculated the premium at $20,880; the city's expert calculated it at $5,000. *Id.*

On appeal, these findings were affirmed by the Ninth Circuit. *Azul Pacifico, Inc. v. City of Los Angeles*, ___ F.2d ___, ___, 1991 WL 224528 at 5 (9th Cir. 1991). "The premium itself, the existence of which the district court found as a matter of fact, establishes that selling tenants can monetize the property right assigned to them by the [rent stabilization ordinance]." *Id.*

Similarly, the Third Circuit in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990) held that the combined impact of the state law and the local ordinance permanently deprived the owners of a possessory interest in their property. *Id.* at 353. The Third Circuit found the physical invasion of the mobilehome properties and the uncompensated creation of interests in them to be more pronounced than that in *Loretto*. Id. The Court emphasized that the payment to the vacating tenant was in part a payment of future rent:

> [T]he purchaser of a mobile home who pays a premium for the right to keep the home in a mobile home park pays for the cost of the tenancy rather than for the mobile home. Thus, the premium is nothing more than rent for the pad which, depending upon whether the purchase is financed or paid for in cash, the new tenant pays during his tenancy or in advance. But this rent is paid not to the appellants who own the parks but to the prior tenant who, by virtue of the Barnegat Ordinance and state law has been granted a valuable alienable possessory interest in the park.

Id. In comparing the case with other rent control cases, the Court noted the uniqueness of the mobilehome legislation which has brought about the taking. With rent control of apartment dwellings, the landlord selects and rents to the new tenants.[6] The vacating tenant is not empowered to sell the right to occupy the premises. Furthermore, the tenant cannot occupy the premises in perpetuity. The tenant does not acquire an inheritable right. *Id.* at 355. The Third Circuit reversed the District Court's dismissal of the action and remanded the case for further proceedings on the merits of the plaintiffs' claim.

C. The Rejection of the *Hall* and *Barnegat* Analysis by the Court of Appeal in this Case Was Erroneous as a Matter of Law.

The Court of Appeal in this case rejected the Petitioners' contention that the combined effect of the state and local laws constituted a taking of property. Remarkably, in light of the procedural posture of the case, the Court opposed Petitioners' theory of taking with its own counter theory. It stated that "[w]here a governmental regulation purports to reduce the excessive and unfair price to a reasonable level, the mere fact that the price for complementary goods and services rises as a result does not transmute an otherwise

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6 Within the term of the lease, however, the tenant may be able to capture the premium afforded by rent control through the mechanism of a sublease, if permitted under applicable law.

reasonable price regulation into a compensable 'taking.'" Yee v. City of Escondido, 224 Cal.App.3d 1349, 1353, 274 Cal.Rptr. 551, 553 (1990). While the Court's explanation may be interesting, and even enlightening, it is clearly a discussion of the merits and a rejection of Petitioners' theory without giving them a chance to prove their theory through evidence.

The Court of Appeal appears to have assumed that the rent controlled rate is actually closer to fair market rental value than is uncontrolled rent. Id. This is clearly a factual matter to be determined by evidence, not assertion. Nevertheless, the Court of Appeal further criticized Hall with this statement: "Hall and commentators of a like view assume that the uncontrolled rent for a mobilehome space is its 'fair' rental value. (See Hall, 833 F.2d at 1276 (Tenants pay 'only a fraction of what it is worth in rent. . . .')." 224 Cal.App.3d at 1357 n.9, 274 Cal.Rptr. at 556 n. 9. The Court clearly lost sight of the procedural posture of both this case and the Hall case. The Hall Court was bound, as was the Court of Appeal, to assume that the factual allegations of the plaintiffs' complaint were true.

As noted by the dissent, Petitioners alleged a taking through the combined application of state and local law. (Id. at 1359, 274 Cal. Rptr. at 558 (Huffman, J., dissenting). This ordinarily raises a factual issue with respect to the operation of the law, not the facial validity. As such, the California Court of Appeal's attempt to resolve a factual matter without the benefit of evidence is erroneous as a matter of law.

The Court of Appeal also criticized Hall and Barnegat because of their reliance on Loretto, which it argued was substantially eroded by this Court's subsequent decision in F.C.C. v. Florida Power Corp., 480 U.S. 245 (1987).

This contention is easily dispelled by a careful reading of this case. In F.C.C. v. Florida Power Corp., utility companies challenged an Act of Congress which authorized the Federal Communication Commission to regulate the rates, terms and conditions for the attachment of cable television systems to existing utility company poles. Relying on Loretto, the companies claimed that this was a physical taking of their property. The Eleventh Circuit agreed, but this Court reversed.

Unlike Loretto, the utility companies were not required to grant cable companies space on the poles. There was no authorized physical occupation of the challengers' property. 480 U.S. at 251. This Court emphasized: "This element of required acquiescence is at the heart of the concept of occupation." Id. at 252. Moreover, this Court specifically noted: "We do not decide today what the application of [Loretto] would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." Id. at 251-52, n. 6 (emphasis added). This, of course, is precisely the issue that is before this Court now. The mobilehome park owner is required under state law to refrain from terminating tenancies (except for cause), to renew leases which have a specified term (Calif. Civ. Code §§ 798.55 & 798.56), and to enter to agreements with new tenants upon the sale of a mobilehome coach by an existing tenant (Calif. Civ. Code § 798.74(a)). Florida Power, therefore, did not undermine Loretto; it specifically reserved decision on the question of Loretto's application to the facts of this case.

Nor it cannot be argued, as has Respondent[7], that Pennell v. City of San Jose, 485 U.S. 1 (1988) undermines the rationale of Loretto. In Pennell, apartment owners

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[7] See Respondent's Brief in Opposition to Certiorari, pp. 14-15.

challenged a rent control ordinance which allowed for an automatic annual increase in rent by as much as 8 percent, with an administrative review for landlord requests for greater increases. In connection with the administrative hearing for the increase, the hearing officer had to take into account "the hardship to a tenant." 485 U.S. at 5. The challengers asserted that this provision accomplished "a transfer of the landlord's property to individual hardship tenants." Id. at 9. Because the hardship provision had never been relied upon by the hearing officer, this Court held that the case did not "present a sufficiently concrete factual setting for the adjudication of the takings claim . . . ." Id. at 10. With respect to the physical takings issue, this Court specifically declined "to address this contention not only because it was raised for the first time in this Court, but also because it, too, is premised on a hearing officer's actually granting a lower rent to a hardship tenant." Id. at 11 n. 5. It is clear that, like Florida Power, there is nothing in this decision which in any way undermines the rationale of Loretto.[8]

Application of the Loretto analysis to this case, as was done by the Ninth Circuit and the Third Circuit, means that the Escondido Ordinance is to be subjected to the per se rule for physical takings. In such instance, the question then becomes how much compensation is due. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 441.

There is nothing in the record which would indicate that Petitioners have receive anything for "the taking of the

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[8] Likewise, United States v. Sperry, 493 U.S. 52 (1989) cannot be relied upon as evidence for the proposition that the rationale of either Loretto or Hall has been undermined. Sperry's holding that "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services" (Id. at 63) is unexceptional.

alienable physical property interest vested in their tenants." Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F.2d 347, 353 (3d Cir. 1990). Because the state court never reached this issue, it is appropriate to remand this case to the state court for further proceedings on this issue.

11. The Escondido Ordinance Does Not "Substantially Advance Legitimate State Interests" and It "Denies an Owner Economically Viable Use of His Land."

In the event that the Escondido Ordinance does not constitute a physical taking, then it must meet the standard for land use regulations generally. A "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).[9]

The justification underlying the Ordinance, as stated by the Respondent, is:

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[9] Amici again state that this formulation of the question is based on their understanding of this Court's certification of Petitioners' second issue. ___ U.S. ___, 112 S.Ct. 294 (1991). Nollan v. California Coastal Commission, 483 U.S. 825 (1987) is a regulatory taking case which articulates a higher standard than the rational basis test. Id. at 834. This approach has been characterized or viewed by commentators as an example of "substantive due process." See, e.g., Epstein, Takings: Descent and Resurrection, 1987 Sup. Ct. Rev. 1, 38, 44; Karlen, Back to the Future: From Nollan to Lochner, 17 Southwestern L. Rev. 627, 630-31 (1988); Recent Developments, Making Room at the Inn: Rent Control as a Regulatory Taking, 38 Wash. U. J. of Urb. and Contemp. Law 305, 329-300 (1990).

> The Escondido Ordinance seeks to remedy an inequitable market situation caused by the scarcity of mobilehome spaces by protecting mobilehome owners from unreasonable space rental increases, therefore protecting the homeowner's investments, while also providing park owners with a just and reasonable return on the park owner's investment.

(Respondent's Brief in Opposition to Certiorari, p. 27). It must be conceded that the protection of consumer welfare is a legitimate purpose of local government. See Pennell v. City of San Jose, 485 U.S. 1, 13 (1988). The real question is whether the means used by local government in this case "substantially advance" this legitimate interest.

As a general proposition, this Court has held that rent controls are sufficiently related to this end to survive a due process scrutiny. Pennell v. City of San Jose, 485 U.S. 1, 13-14 (1988). Pennell's holding, however, is not dispositive with respect to the Escondido Ordinance. The absence of vacancy decontrol, when combined with the state mobilehome residency guarantee of a perpetual tenancy and a right to transfer such tenancy, is not closely related to the asserted goal of "protecting mobilehome owners from unreasonable space rental increases." In fact, it merely changes the identity of the party who may reap the benefit of any future rise in the market for mobilehome spaces.

Regulation of rents without regulation of the resale of mobilehome coaches allows the current tenant to reap the economic benefit of future rent control. The original reason for rent control, protecting mobilehome owners from "unreasonable" increases in the cost of mobilehome housing, thus disappears. If the reason for the lack of vacancy decontrol is the protection of future mobilehome owners this is contradicted by the apparent unwillingness to regulate the

sale of the coach,[10] which is actually easier to control because there are industry guides on resale values available.[11] If it is argued that rent control must be carried over to the new purchaser in order to allow the seller to be able to protect the investment in the mobilehome coach, the failure to regulate the resale of the coach allows more than the protection of investment. It creates a windfall for the seller at the expense of the park owner. In this sense, the Ordinance is underinclusive. See, e.g., Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 285 n. 19 (1985); Mississippi University for Women v. Hogan, 458 U.S. 718, 730-31 (1982).

If the justification is articulated as protecting tenants in mobilehome parks with limited incomes, the failure to decontrol the rent when such tenants terminate their tenancy indicates that the Ordinance is overinclusive as well. The Ordinance may also be overinclusive because of its apparent assumption that all mobilehome parks operate in a monopolistic market context.[12] See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 500 (1977).

A close examination of the Escondido Ordinance, as required by the higher standard for regulation of property interests articulated in Nollan, 483 U.S. at 834, shows that the "fit" between the admittedly legitimate purpose and the means used by the Respondent in this case is not a close one. The interest asserted is therefore not "substantially

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10 This irony was noted by the Third Circuit in Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F.2d 347, 353 n.9 (3d Cir. 1990).

11 See, e.g., the current edition of the Kelley Blue Book, Manufactured Housing and Mobile Home Guide.

12 See Respondent's Brief in Opposition to Certiorari, p. 28.

advanced" by the means used. See also Seawall Associates v. City of New York, 74 N.Y.2d 92, 111-12, 542 N.E.2d 1059, 1068-69 (1989), cert. denied, 493 U.S. 976 (1989). There are less restrictive alternatives available other than the blunt instrument of a regulatory taking. Respondent (or the state) might choose to provide housing subsidies for low and fixed income tenants or perhaps it might offer a reduction or elimination of the park owner's property taxes if there is a voluntary cap placed on rents.

The Ordinance also denies the owner the economically viable use of the property because the property interest has been transferred to the current tenant. The landlord is compensated, of course, for the use of the mobilehome space during the rental period (although the Petitioners contend that this compensation is at a less than fair market rate). But there is no compensation provided the transfer of the right to reap the benefit of any future rise in the market for mobilehome spaces, nor is there compensation for loss of the right to choose the next tenant.

Because the Escondido Ordinance is not substantially related to a legitimate governmental interest and because it deprives the owner of property of the economic use of same, the Ordinance fails to meet the Nollan standard. This Court should therefore reverse and remand on this ground as well.

CONCLUSION

The Escondido Ordinance, though possibly well-intentioned, deprives the park owner of valuable property rights without achieving any long-term advantage for tenants. The Ordinance confers a one time benefit to a selected group of tenants. That is a taking. What is needed is a more appropriate balance between the desire to protect consumer welfare while at the same time protecting the

constitutional property rights of park owners. Escondido has attempted to acquire low income mobilehome housing for its community without taking the responsibility of paying for it. It is yet another form of "off-budget spending." This is especially pernicious because it removes an important question of social policy from the normal restraints of the political process.

This case presents an important opportunity for this Court to demonstrate the vitality of the Constitution's express guarantee that private property shall not "be taken for public use, without just compensation." The factual circumstances alleged by Petitioners show that there has been a permanent physical occupation of property by parties acting under the authority of state and local law. The Respondent's own justification of the Ordinance demonstrates the "public use" to which the Petitioners' property is burdened. What is required therefore is a reversal of the decision of the lower court and a remand so that the amount of just compensation can be determined.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN K. YEE AND IRENE S. YEE, H.N. AND FRANCES C. BERGER FOUNDATION, MOUNTAIN SHADOWS MOBILE HOME ESTATES, RICHARD C. KUEBLER, dba MOONGLOW MOBILE HOME PARK, CASA DE AMIGOS MOBILE HOME ESTATE, VISTA VERDE, LTD., IMPERIAL ESCONDIDO MOBILE ESTATES and MILDRED D. TACEY,

Petitioners,

vs.

THE CITY OF ESCONDIDO,

Respondent.

BRIEF FOR ACTION IN SANTA MONICA AS AMICUS CURIAE

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

This brief supports petitioners in seeking reversal of the decision of the Fourth Appellate District, Division One, Court of Appeal for California, which states a rent control law that in operation required petitioners to accept as tenants persons petitioners as owners of rental property had not chosen, constituted neither a taking without just compensation nor a denial of due process of law in violation of the Fifth Amendment to the United States Constitution. Consent to file was obtained from counsel for petitioners and respondent.

INTEREST OF ACTION IN SANTA MONICA

Amicus "ACTION in Santa Monica" is a group of over 700 apartment building owners in the City of Santa Monica, covered by a

rent control law ("the Rent Control Law")[1] similar to that covering petitioners, not allowing vacancy decontrol. That is, when a tenant moves, the owner must charge a new tenant the same rent charged the previous one, base rent plus adjustments the Rent Control Board has allowed since the Rent Control Law passed in 1979.

Amicus' interest in this case is in aiding the Court to make a clear decision exactly what constitutes a taking of appellants' property. This is not sale of mobile homes at a premium due to the right to park them on rent-controlled spaces, as the Hall case[2] originally seemed to state, but rather, as the Pinewood Estates[3] and

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1 City Charter Chapter 18, commonly called the Rent Control Charter Amendment, attached in the Appendix hereto as Exhibit A.

2 Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987), cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

3 Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990).

Azul Pacifico[4] cases have more recently stated, passing a rent control law that, in combination with state law, gives tenants a right to stay indefinitely on the owners' property. The power to exclude, basic to private property, has been taken. Compensation for taking away of that power is what the Court should state is due.

The difference in how the Court finds the taking is important to amicus beyond its importance to the parties. Amicus members face a situation where state law and unclear provisions of the Rent Control Law added in 1989 have not yet been interpreted by the highest court of the state to require keeping new tenants chosen by old tenants. Lower courts have stated amicus have no right to evict tenants for

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4 Azul Pacifico, Inc. v. City of Los Angeles, ____ F.2d ____ (9th Cir., November 1, 1991, 91 Daily Journal D.A.R. 13599).

sub-leasing unless owners reserved the right in leases predating rent control. Even if owners could evict the tenants, an unauthorized sub-tenant seems to be given the right to stay as a tenant under the Rent Control Law, as simply being an unauthorized sub-tenant is not a "good cause" required for eviction.[5] Thus, if

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5 See Exhibit A in Appendix, section 1806, and Regulations of Santa Monica Rent Control Board, chapter 9, in Exhibit B in Appendix. See particularly Section 1806(g), which allows eviction of an unauthorized sub-tenant only "at the end of the term of [a] rental housing agreement." An informal survey indicates in approximately 80% of the cases, amicus members before rent control did not have rental housing agreements with termination dates. Under Section 1806(e), they cannot now require such terms. Also see particularly, Sections 2004, 9002(j) and 9007 of the Rent Control Board's Regulations in Exhibit B, added together in 1989 and apparently meant to keep amicus from being able to limit residents of apartments to the particular tenants amicus have chosen. In addition, the City of Santa Monica requires owners to accept as tenants spouses and children who come to live with a tenant after the beginning of a tenancy, so that it appears, in the event of divorce or death of the original tenant and a desire of the new tenant to stay in the apartment without the original tenant, the owner must accept the stranger as a tenant. These provisions have not been tested through the highest court in the state for their meaning and effect.

this Court states clearly in this case that the taking consists of taking away the power to exclude tenants, and the highest state court later states amicus cannot exclude unauthorized sub-tenants, a taking will then be established. On the other hand, if this Court requires a sale of a mobile home coach to establish the taking, this case will not apply to amicus.

More importantly to the Court and to the development of the takings law, if the Court finds the taking consists of what the owners have lost, not what the tenants have gained, amicus here submits the Court will rule correctly. The taking consists, not of what the state gives another person--in this case, the premium for a coach; but rather, of what the state takes from the owner--in this case, the right to exclude

unwanted tenants.[6]

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[6] Amicus does not here discuss whether rent control can without just compensation take away the right an owner had before rent control to exclude the very tenant the owner had chosen, due to changes in the behavior of the tenant, a need of the owner for the apartment, or other circumstances after the tenancy began. That question will have to remain for a case where the facts more closely present that issue. Here, where the question is whether compensation is due when the facts indicate transfers to strangers to the owners have occurred, amicus submits it is appropriate to frame the answer so that it consistently treats all owners, not just mobile home park owners, from whom the right to exclude strangers is taken by particular rent control laws.

Amicus also has no interest separate from that of the parties in the substantive due process claim, so amicus will not discuss that issue.

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SUMMARY OF ARGUMENT

I. A rent control law such as that involved in this case, operating to allow tenants unauthorized by the owner to stay indefinitely on the owner's property, consists of a taking for public use without just compensation because if the law is regulatory, allowing tenants to choose the next tenants does not substantially advance a legitimate state interest. If the legitimate reason for a rent control law is a shortage of rentals,[7] allowing tenants rather than owners to exploit the shortage accomplishes no purpose. The cost to new tenants is the same whether they pay a bonus to moving tenants for a space, or pay the owner. Transfering ownership rights in

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[7] A proposition amicus accepts only for purposes of argument.

property to tenants is thus confiscatory, for no legitimate state purpose.

II. If the rent control law allows permanent possessory rights to tenants, the law constitutes a taking without just compensation regardless of the state's interest, so discussion of any legitimate state interest is irrelevant.

ARGUMENT

I. The rent control law operating to authorize tenants unauthorized by the owner constitutes a taking because if it is regulatory, it substantially advances no legitimate state interest.

Land use regulations have been granted deference by this Court as long as they substantially advance a legitimate state interest. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981). This deference comes under both a due process of law analysis or a takings analysis, since if the law involved is regulatory, the analysis under the two clauses is the same. The question is whether the law is authorized under the state's police power, that is, substantially advances a legitimate state interest.

In the case of a rent control law that allows moving tenants to choose the next

tenants, whether or not as was in evidence in the instant case, the moving tenants charge for the privilege, no legitimate state interest is advanced. The state may have an interest in allowing tenants to receive money because the state thinks tenants are poor or deserving or voters, but unless the state uses general funds to support that belief, that interest is not legitimate. "Robin Hood" ideas of redistribution of wealth are not countenanced by the Fifth Amendment, which requires that society in general, rather than a few citizens, pay for general problems. Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 83 n. 7 (1980), citing United States v. Rands, 389 U.S. 121, 126 (1967). Thus, because the interest advanced by allowing tenants to choose the next tenants is not legitimate,

even if this law is regulatory, it violates the takings clause.

II. If the rent control law allows permanent possessory rights to tenants by allowing them to choose the next tenants, the law constitutes a taking without just compensation regardless of the state's interest. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). Thus, the three-part test in Hall v. City of Santa Barbara, 833 F.2d 1270, 1280 (9th Cir. 1987), cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), followed in Azul Pacifico v. City of Los Angeles, ___ F.2d ___ (9th Cir. November 1, 1991, 91 Daily Journal D.A.R. 13599, 13600), is incorrect in possessory rights cases in including the middle prong. For if the first prong is found in the affirmative, a

taking is established under Loretto, supra, regardless of the state interest.

Here, where tenants can stay in an owner's property whether or not the owner approves, for as long as the tenants wish, and can transfer that right without the owner's approval, there is without doubt possession. In these circumstances, the state cannot have an interest sufficient to remove the requirement that it pay compensation.

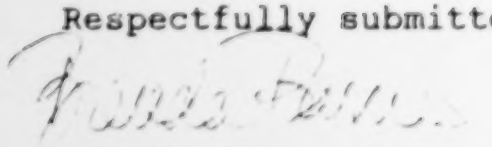
CONCLUSION

Requiring owners such as appellants to accept unauthorized tenants satisfies no legitimate state interest so is a taking if the law is seen as regulatory. Further, it takes the right to use, dispose of and sell property from the owners and gives it to the tenants, so is a taking regardless of the state's interest. The judgment of the Fourth Appellate District, Division One, of

the State of California should be reversed for either reason.

DATED: November 25, 1991

Respectfully submitted,



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APPENDIX A

SECTION 1800. **Statement of Purpose.** A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens. The purpose of this Article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return.

In order to accomplish this purpose, this Article provides for an elected Rent Control Board to ensure that rents are at a fair level by requiring landlords to justify any rents in excess of the rents in effect one year prior to the adoption of this Article. Tenants may seek rent reductions from the rent in effect one year prior to the adoption of this Article by establishing that those rents are excessive. In addition to giving tenants an opportunity to contest any rent increase, this Article attempts to provide reasonable protection to tenants by controlling removal of controlled rental units from the housing market and by requiring just cause for any eviction from a controlled rental unit.

Through this Article, the City exercises its police power in order to address the serious housing problem recognized in the original enactment of this Rent Control Law in 1979 and still existing in 1984. The 1984 Amendment to the Rent Control Law is intended to clarify the law and ensure that the Rent Control Board possesses adequate and independent authority to carry out its duties. It is intended to ensure due process of law for landlords and tenants, effective remedies for violation of the law, and consistency with constitutional requirements. It is also intended to enable the Board to provide relief to persons facing particular hardship and to protect and increase the supply of affordable housing in the City. Termination or erosion of the protections of this Article would have serious disruptive consequences for persons in need of protection and the supply of affordable housing in the City.

SECTION 1801. **Definitions.** The following words or phrases as used in this Article shall have the following meanings:

(a) **Board.** The term "Board" refers to the elected Rent Control Board established by this Article.

(b) **Commissioners.** The members of the Board and Interim Board are denominated Commissioners.

(c) **Controlled Rental Units.** All residential rental units in the City of Santa Monica, including mobile homes, and mobile home spaces, and trailers and trailer spaces, except single family homes to the extent provided for in Section 1815 and those units found by the

Board to be exempt under one or more of the following provisions:

(1) Rental units in hotels, motels, inns, tourist homes and rooming and boarding houses which are rented primarily to transient guests for a period of less than fourteen (14) days.

(2) Rental units in any hospital, convent, monastery, extended medical care facility, asylum, non-profit home for the aged, or dormitory owned and operated by an institution of higher education.

(3) Rental units which a government unit, agency or authority owns, operates, manages, or in which governmentally subsidized tenants reside only if applicable Federal or State law or administrative regulation specially exempt such units from municipal rent control.

(4) Rental units in owner-occupied dwellings with no more than three (3) units. For purposes of this section:

(i) The term "owner" means a natural person who owns a fifty (50) percent ownership interest in the building and resides on the property as his or her principal place of residence.

(ii) An exemption under this Section shall expire by operation of law when the owner ceases to reside on the property as his or her principal place of residence; thereafter, all units on the property shall be subject to all provisions of this Article.

(5) Rental units and dwellings constructed after the adoption of this Article; this exemption does not apply to units created as a result of conversion as opposed to new construction.

(6) Where a unit is actually used for purposes of providing, on a nonprofit basis, child care or other residential social services in accordance with applicable laws. This exemption shall expire when the use upon which exemption is based ceases. This exemption shall only apply to units as they become vacant and shall only operate to allow the specified use without the necessity of obtaining a removal permit under this Article. This exemption shall not be construed to authorize the eviction of any tenant nor to authorize the charging of rent in excess of that permitted under this Article. The Board may adopt regulations to determine whether a unit qualifies for an exemption under this Section.

(7) Exemptions are not automatic but shall be granted by the Board upon application by the owner pursuant to Board rules, provided that if the Board does not act upon a completed application for exemption within ninety (90) days of its filing it shall be deemed approved.

(d) **Housing Service.** Housing services include, but are not limited to repairs, maintenance, painting, providing light, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, refuse removal, furnishings, telephone, parking, and any other benefit, privilege or facility connected with the use or occupancy of any rental unit. Services to a rental unit shall include a proportionate part of services provided to common facilities of the building in which the rental unit is contained.

(e) **Landlord.** An owner, lessor, sublessor or any other person entitled to receive rent for the use and occupancy of any rental unit, or an agent, representative or successor of any of the foregoing.

(f) **Rent.** All periodic payments and all nonmonetary consideration including but not limited to, the fair market value of goods or services rendered to or for the benefit of the landlord under an agreement concerning the use or occupancy of a rental unit and premises including all payment and consideration demanded or paid for parking, pets, furniture, subletting and security deposits for damages and cleaning.

(g) **Rental Housing Agreement.** An agreement, oral, written or implied, between a landlord and tenant for use or occupancy of a rental unit and for housing services.

(h) **Rental Units.** Any building, structure, or part thereof, or land appurtenant thereto, or any other rental property rented or offered for rent for living or dwelling house units, together with all housing services connected with use or occupancy of such property such as common areas and recreational facilities held out for use by the tenant.

(i) **Tenant.** A tenant, subtenant, lessee, sublessee or any other person entitled under the terms of a rental housing agreement to the use or occupancy of any rental unit.

(j) **Recognized Tenant Organization.** Any group of tenants residing in controlled rental units in the same building or in different buildings

operated by the same management company, agent or landlord, who requests to be so designated.

(k) **Rent Ceiling.** Rent ceiling refers to the limit on the maximum allowable rent which a landlord may charge on any controlled rental unit.

(l) **Base Rent Ceiling.** The maximum allowable rent established in Section 1804(b).

(m) **Property.** All rental units on a parcel or lot or contiguous parcels or contiguous lots under common ownership.

(n) **Single Family Home.** A property that has been developed with only one one-family dwelling and any lawful accessory structures, or a lawfully created condominium, stock co-operative or similar unit that is part of a larger residential structure or complex, excepting those condominiums, stock cooperatives, or similar units converted after April 10, 1979 for which no removal permit or vested right determination has been issued by the Board, and those created pursuant to Article XX of this Charter.

SECTION 1802. **Integrity and Autonomy of Board.** The Rent Control Board shall be an integral part of the government of the City, but shall exercise its powers and duties under this Article independent of and without interference from the City Council, City Manager, and City Attorney. With respect to the internal organization and affairs of the Board:

(a) **Budget.** The Board shall, prior to July 1 of each year, hold a public hearing on a proposed budget and adopt an annual budget for the ensuing fiscal year. At least thirty-five (35) days prior to the beginning of each fiscal year, the Board's administrator shall submit to the Board the proposed budget as prepared by him or her. After reviewing the same and making such revisions as it may deem advisable, the Board shall determine the time for the holding of a public hearing thereon and shall cause to be published a notice thereof not less than ten (10) days prior to said hearing, by at least one insertion in the official newspaper. Copies of the proposed budget shall be available for inspection by the public in the office of the Board at least ten (10) days prior to said hearing. The City Council and the City Manager shall have no authority to oversee, supervise, or approve this budget. Upon final adoption, the budget shall be in effect for the ensuing fiscal year and the amounts stated therein shall be and become appropriated by the Board for the respective objects and purposes therein specified. At any meeting after the adoption of the budget, the Board may amend or supplement the budget by the affirmative votes of at least three (3) members. Copies of the adopted budget and any amendments or supplements shall be filed with the City Clerk, City Controller, and City Manager. Necessary adjustments to City administrative procedures shall be made.

(b) **Personnel.** Except for the elected or appointed Commissioners, the Administrator, and attorneys employed to represent or advise

the Board, all employees of the Board are within the classified Civil Service of the City. The Board shall appoint an Administrator to administer and supervise the exercise of its powers and duties who shall be directly responsible to the Board. All employees of the Board, except the Administrator and attorneys, shall be hired, terminated, suspended, and demoted in accordance with the provisions of Article XI of the Charter and implementing provisions of the Municipal Code. The Board shall classify employee positions, establish employee salaries and benefits, evaluate the performance of its employees, and be responsible for the layoff and recall of its employees, pursuant to regulations and procedures that it establishes. The Board may enter into and approve a Memorandum of Understanding with representatives of its employees concerning their wages, benefits, hours of work, and terms and conditions of employment in accordance with State law. The City Council shall have no power to abolish positions established or classified by the Board under this Article, notwithstanding any other section of this Charter. Provisions of the Municipal Code and other ordinances or resolutions of the City Council shall not limit the Board's power to adopt regulations and policies and to approve Memorandums of Understanding governing its relationship with its employees under this Section.

(c) **Board Legal Work.** Legal staff hired by the Board shall represent and advise the Board,

its Commissioners, and its staff in any civil matters, actions, or proceedings in which the Board, its Commissioners, or its staff, in or by reason of their official capacity, are concerned or are a party. The Board may, in its sole discretion, and without approval of the City Council, retain private attorneys to furnish legal advice or representation in particular matters, actions or proceedings.

(d) **Contracts and Purchases.** The Board shall comply with the provisions of the City Charter providing for a centralized purchasing system and competitive bidding, and shall procure goods and services as do other City agencies. Provided, however, that the Board shall have sole and final authority to employ attorneys, legislative lobbyists, and other professionals, and to approve contracts for such professional services.

(e) **Conforming Regulations.** If any portion of this Article is declared invalid or unenforceable by decision of a court of competent jurisdiction or rendered invalid or unenforceable by State or Federal legislation, the Board and not the City Council shall have authority to enact replacement regulations consistent with the intent and purpose of the invalidated provision and applicable law. Such replacement regulations shall supersede invalidated or unenforceable provisions of this Article to the extent necessary to resolve any inconsistency. The subject matter of such replacement regulations shall be limited to rent control matters as enumerated in this Article.

SECTION 1803. **Permanent Rent Control Board.**

(a) **Composition.** There shall be in the City of Santa Monica a Rent Control Board. The Board shall consist of five (5) elected Commissioners. The Board shall elect annually as chairperson, one of its members to serve in that capacity.

(b) **Eligibility.** Duly qualified electors of the City of Santa Monica are eligible to serve as Commissioners of the Board.

(c) **Full Disclosure of Holdings.** Candidates for the position of Commissioner shall submit a verified statement listing all of their interests and dealings in real property, including but not limited to its ownership, sale or management, during the previous three (3) years.

(d) **Election of Commissioners.** Commissioners shall be elected at general municipal elections in the same manner as set forth in Article XIV of the Santa Monica Charter, except that the first Commissioners shall be elected at a special municipal election held within ninety (90) days of the adoption of this Article. The elected Commissioners shall take office on the first Tuesday following their election.

(e) **Term of Office.** Commissioners shall be elected to serve terms of four (4) years, beginning on the first Tuesday following their election, except that of the first five (5) Commissioners elected in accordance with Section 1803(d), the two (2) Commissioners receiving the most votes shall serve until April 15, 1985

and the remaining three (3) Commissioners shall serve until April 18, 1983. Commissioners shall serve a maximum of two (2) full terms.

(f) **Powers and Duties.** The Board shall have the following powers and duties:

(1) Set the rent ceilings for all controlled rental units.

(2) Require registration of all controlled rental units under Section 1803(q).

(3) Establish a base rent ceiling on rents under Section 1804(b).

(4) To make adjustments in the rent ceiling in accordance with Section 1805.

(5) Set rents at fair and equitable levels in order to achieve the intent of this Article.

(6) Hire and pay necessary staff, including hearing examiners and personnel to issue orders, rules and regulations, conduct hearings and charge fees as set forth below.

(7) Make such studies, surveys and investigations, conduct such hearings, and obtain such information as is necessary to carry out its powers and duties.

(8) Report annually to the City Council of the City of Santa Monica on the status of controlled rental housing.

(9) Remove rent controls under Section 1803(r).

(10) Issue permits for removal of controlled rental units from rental housing market under Section 1803(t).

(11) Administer oaths and affirmations and subpoena witnesses.

(12) Establish rules and regulations for deducting penalties and settling civil claims under Section 1809.

(13) Refer violations of this Article to appropriate authorities for criminal prosecution.

(14) Seek injunctive and other civil relief under Section 1811.

(15) Charge and collect registration fees including penalties for late payments.

(g) **Rules and Regulations.** The Board shall issue and follow such rules and regulations, including those which are contained in this Article, as will further the purposes of this Article. The Board shall publicize its rules and regulations prior to promulgation in at least one newspaper of general circulation in the City of Santa Monica. The Board shall hold at least one public hearing to consider the views of interested parties prior to the adoption of general adjustments of the decision to decontrol or reimpose control for any class of rental units under Section 1803(r). All rules and regulations, internal staff memoranda, and written correspondence explaining the decisions, orders, and policies of the Board shall be kept in the Board's office and shall be available to the public for inspection and copying. The Board shall publicize this Article so that all residents of Santa Monica will have the opportunity to become informed about their legal rights and duties under Rent Control in Santa Monica. The Board shall prepare a brochure which fully describes the legal rights and duties of landlords and tenants under Rent Control in Santa Monica.

The brochure will be available to the public, and each tenant of a controlled rental unit shall receive a copy of the brochure from his or her landlord.

(h) **Meetings.** The Board shall hold such regularly scheduled meetings as are necessary to ensure the timely performance of its duties under this Article. All regular and special meetings shall be called and conducted in accordance with State law.

(i) **Quorum.** Three (3) Commissioners shall constitute a quorum for the Board.

(j) **Voting.** The affirmative vote of three (3) Commissioners of the Board is required for a decision, including all motions, regulations, and orders of the Board.

(k) **Compensation.** Each Commissioner shall receive for every meeting attended seventy-five dollars ($75.00), but in no event shall any Commissioner receive in any twelve (12) month period more than forty-seven hundred and fifty dollars ($4,750) for services rendered.

(l) **Dockets.** The Board shall maintain and keep in its office all hearing dockets.

(m) **Vacancies.** If a vacancy shall occur on the Board, the Board shall within thirty (30) days appoint a qualified person to fill such a vacancy until the following municipal election when a qualified person shall be elected to serve for the remainder of the term.

(n) **Financing.** The Board shall finance its reasonable and necessary expenses by charging landlords annual registration fees in amounts

deemed reasonable by the Board. The Board may direct that all or part of such fees may be passed through from landlords to tenants and may establish applicable conditions and procedures. The Board is also empowered to request and receive funding when and if necessary from any available source for its reasonable and necessary expenses.

(o) **Recall.** Commissioners may be recalled in accordance with the provisions of Article XIV of the Santa Monica Charter.

(p) **Staff.** The Board shall employ and pay such staff, including hearing examiners and inspectors, as may be necessary to perform its function efficiently in order to fulfill the purpose of this Article.

(q) **Registration.** Within sixty (60) days after the adoption of this Article, the Board shall require the registration of all controlled rental units, which shall be re-registered at times deemed appropriate by the Board. The initial registration shall include the rent in effect at the time on the date of the adoption of this Article, base rent ceiling, the address of the rental unit, the name and address of the landlord, the housing services provided to the unit, a statement indicating all operating cost increases since the base rent ceiling date, and any other information deemed relevant by the Board. The Board shall require the landlord to report vacancies in the controlled rental units and shall make a list of vacant controlled rental units available to the public. If the Board, after the landlord has proper notice and after a

hearing, determines that a landlord has wilfully and knowingly failed to register a controlled rental unit, the Board may authorized the tenant of such a non-registered controlled rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is properly registered. After a rental unit is properly registered, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not properly registered. Whether or not the Board allows such withholding, no landlord who has failed to register properly shall at any time increase rents for a controlled rental unit until such units are properly registered.

(r) **Decontrol.** If the average annual vacancy rate in any category, classification, or area of controlled rental units exceeds 5 percent, the Board is empowered, at its discretion and in order to achieve the objectives of this Article, to remove rent controls from such category, classification or area. The Board may determine such categories, classifications, or areas for purposes of decontrol consistent with the objectives of this Article. In determining the vacancy rate for any category, classification or area of controlled rental units, the Board shall consider all available data and shall conduct its own survey. If units are decontrolled pursuant to this Subsection, controls shall be reimposed if the Board finds that the average annual vacancy rate has thereafter fallen below 5 percent for such category, classification or area.

(s) **Security Deposits.** Any payment or deposit of money the primary function of which is to secure the performance of a rental agreement or any part of such agreement, including an advance payment of rent, shall be placed in an interest bearing account at a federally insured financial institution until such time as it is returned to the tenant or entitled to be used by the landlord. Unless and until the Board enacts regulations directing that the interest on such accounts be paid directly to the tenant, the landlord may either pay such interest directly to the tenant or use it to offset operating expenses, in which case the offset shall be a factor in making individual rent adjustments under Section 1805. The Board may regulate the amount and use of security deposits consistent with the purposes of this Article and State law.

(t) **Removal of Controlled Unit From Rental Housing Market.**

(1) Any landlord who desires to remove a controlled rental unit from the rental housing market by demolition, conversion or other means is required to obtain a permit from the Board prior to such removal from the rental housing market in accordance with rules and regulations promulgated by the Board. In order to approve such a permit, the Board is required to find that the landlord cannot make a fair return by retaining the controlled rental unit.

(2) Notwithstanding the foregoing provisions of this Subsection, the Board may approve such a permit:

(i) If the Board finds that the controlled rental unit is uninhabitable and is incapable of being made habitable in an economically feasible manner; or

(ii) If the permit is being sought so that the property may be developed with multifamily dwelling units and the permit applicant agrees as a condition of approval, that the units will not be exempt from the provisions of this Article pursuant to Section 1801(c) and that at least 15 percent of the controlled rental units to be built on the site will be at rents affordable by persons of low income.

(3) The Housing Element of the General Plan of the City of Santa Monica shall at all times contain a provision that neither the City Council nor any City agency shall approve an application for tentative subdivision map or tentative parcel map for a converted unit until and unless the applicant first obtains a removal permit as required by this Section. This Subsection shall not apply to any tentative subdivision map or tentative parcel map approved in accordance with Article XX relating to tenant ownership rights.

(4) The Board shall render its final decision within one hundred and twenty (120) days of the filing of a completed application under this Section.

SECTION 1804. **Maximum Allowable Rents.**

(a) **Temporary Freeze.** Rents shall not be increased during the one hundred-twenty

(120) day period following the date of adoption of this Article.

(b) **Establishment of Base Rent Ceiling.** Beginning one-hundred-twenty (120) days after the adoption of this Article, no landlord shall charge rent for any controlled rental units in an amount greater than the rent in effect on the date one year prior to the adoption of this Article. The rent in effect on that date is the base rent ceiling and is a reference point from which fair rents shall be adjusted upward or downward in accordance with Section 1805. If there was no rent in effect on the date one year prior to the adoption of this Article, the base rent ceiling shall be the rent that was charged on the first date that rent was charged following the date one year prior to the adoption of this Article.

(c) **Posting.** As soon as the landlord is aware of the maximum allowable rent, the landlord shall post it for each unit in a prominent place in or about the affected controlled rent units. The Board may require that other information it deems relevant also be posted.

SECTION 1805. **Individual and General Adjustment of Ceilings on Allowable Rents.**

(a) **General Adjustment.** The Board may, after holding those public hearings prescribed by Section 1803(g), set and adjust upward or downward the rent ceiling for all controlled rental units in general and/or for particular categories of controlled rental units deemed appropriate by the Board. Such an adjustment,

however, need not take effect immediately, and the Board may decide that new rent ceilings shall not take effect until some reasonable date after the above-stated time periods.

(b) **Annual General Adjustment.** Each year the Board shall generally adjust rents as follows:

(1) Adjust rents upward by granting landlords a utility and tax increase adjustment for actual increases in the City of Santa Monica for taxes and utilities.

(2) Adjust rents upward by granting landlords a maintenance increase adjustment for actual increases in the City of Santa Monica for maintenance expenses.

(3) Adjust rents downward by requiring landlords to decrease rents for any actual decreases in the City of Santa Monica for taxes.

In adjusting rents under this Subsection, the Board shall adopt a formula of general application.

(c) **Petitions.** Upon receipt of a petition by a landlord and/or a tenant, the maximum rent of individual controlled rental units may be adjusted upward or downward in accordance with the procedures set forth elsewhere in this Section. The petition shall be on the form provided by the Board and shall include a declaration by the landlord that the unit meets all requirements of Section 1805(h). Notwithstanding any other provision of this Section, the Board or hearing examiner may refuse to hold a hearing and/or grant a rent adjustment if an individual hearing has been held and

decision made with regard to maximum rent within the previous six (6) months.

(d) **Hearing Procedure.** The Board shall enact rules and regulations governing hearings and appeals of individual adjustment of ceilings on allowable rents which shall include the following:

(1) **Hearing Examiner.** A hearing examiner appointed by the Board shall conduct a hearing to act upon the petition for individual adjustment of ceilings on allowable rents and shall have the power to administer oaths and affirmations.

(2) **Notice.** The Board shall notify the landlord if the petition was filed by the tenant, or the tenant, if the petition was filed by the landlord, of the receipt of such a petition and a copy thereof.

(3) **Time of Hearing.** The hearing officer shall notify all parties, as to the time, date and place of the hearing.

(4) **Records.** The hearing examiner may require either party to a rent adjustment hearing to provide it with any books, records and papers deemed pertinent in addition to that information contained in registration statements. The hearing examiner shall conduct a current building inspection and/or request the City to conduct a current building inspection if the hearing examiner finds good cause to believe the Board's current information does not reflect the current condition of the controlled rental unit. The tenant may request the

hearing examiner to order such an inspection prior to the date of the hearing. All documents required under this Section shall be made available to the parties involved prior to the hearing at the office of the Board. In cases where information filed in a petition for rent ceiling adjustment or in additional submissions filed at the request of the hearing examiner is inadequate or false, no action shall be taken on said petition until the deficiency is remedied.

(5) **Open Hearings.** All rent ceiling adjustment hearings shall be open to the public.

(6) **Right of Assistance.** All parties to a hearing may have assistance in presenting evidence and developing their position from attorneys, legal workers, recognized tenant organization representatives or any other persons designated by said parties.

(7) **Hearing Record.** The Board shall make available for inspection and copying by any person an official record which shall constitute the exclusive record for decision on the issues at the hearing. The record of the hearing, or any part on one, shall be obtainable for the cost of copying. The record of the hearing shall include: all exhibits, papers and documents required to be filed or accepted into evidence during the proceedings; a list of participants present; a summary of all testimony accepted in the proceedings; a statement of all materials officially noticed; all recommended decisions; orders and/or rulings; all final decisions, orders and/or rulings, and the reasons for each final decision, order and/or ruling. Any party may have the

proceeding tape recorded or otherwise transcribed at his or own expense.

(8) **Quantum of Proof and Notice of Decision.** No individual adjustment shall be granted unless supported by the preponderance of the evidence submitted at the hearing. All parties to a hearing shall be sent a notice of the decision and a copy of the findings of face and law upon which said decision is based. At the same time, parties to the proceeding shall also be notified of their right to any appeal allowed by the Board and/or to judicial review of the decision pursuant to this Section and Section 1808 of this Article.

(9) **Consolidation.** All landlord petitions pertaining to tenants in the same building will be consolidated for hearing, and all petitions filed by tenants occupying the same building shall be consolidated for hearing unless there is a showing of good cause not to consolidate such petitions.

(10) **Appeal.** Any person agrieved by the decision of the hearing examiner may appeal to the Board. On appeal, the Board shall affirm, reverse or modify the decision of the hearing examiner. The Board may conduct a de novo hearing or may act on the basis of the record before the hearing examiner without holding a hearing.

(11) **Finality of Decision.** The decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal; however, in

the event that the Board on appeal reverses or modifies the decision of the hearing examiner, the landlord, in the case of an upward adjustment in rent, or the tenant, in the case of a downward adjustment of rent, shall be ordered to make retroactive payments to restore the parties to the position they would have occupied had the hearing examiner's decision been the same as that of the Board.

(12) **Time for Decision.** The rules and regulations adopted by the Board shall provide for final action on any individual rent adjustment petition within one hundred and twenty (120) days, following the date of filing of the individual rent adjustment petition.

(13) **Board Action in Lieu of Reference to Hearing Examiner.** The Board, on its own motion or on the request of any landlord or tenant, may hold a hearing on an individual petition for rent adjustment without the petition first being heard by a hearing examiner.

(14) Decisions decreasing rents shall remain in effect until the Board finds that the landlord has corrected the defect warranting the decrease. The Board shall, by regulation, establish procedures for making prompt compliance determinations. Upon a determination of compliance the landlord shall be entitled to reinstatement of the prior rent level, retroactive to the date that the landlord corrected the defect which warranted the decrease.

(e) In making individual and general adjustment of the rent ceiling, the Board shall

consider the purposes of this Article and the requirements of law. The Board may adopt as its fair return standard any lawful formula, including but not limited to one based on investment or net operating income. The Board shall consider all factors relevant to the formula it employs; such factors may include: increases or decreases in operating and maintenance expenses, the extent of utilities paid by the landlord, necessary and reasonable capital improvement of the controlled rental unit as distinguished from normal repair, replacement and maintenance, increases or decreases in living space, furniture, furnishings, equipment, or services, substantial deterioration of the controlled rental unit other than as a result of ordinary wear and tear, failure on the part of the landlord to provide adequate housing services or to comply substantially with applicable housing, health and safety codes, Federal and State income tax benefits, the speculative nature of the investment, whether or not the property was acquired or is held as a long term or short term investment, the landlord's rate of return on investment, the landlord's current and base date Net Operating Income, and any other factor deemed relevant by the Board in providing the landlord a fair return.

(f) No rent increase shall be authorized by this Article because a landlord has a negative cash flow as the result of refinancing the controlled rental unit if at the time the landlord refinanced the landlord could reasonably have foreseen a negative cash flow based on the rent

schedule then in existence within the one year period following refinancing. This paragraph shall only apply to that portion of the negative cash flow reasonably foreseeable within the one year period following refinancing of the controlled rental unit and shall only apply to controlled rental units refinanced after the date of adoption of this Article.

(g) No rent increase shall be authorized by this Article because a landlord has a negative cash flow if at the time the landlord acquired the controlled rental unit, the landlord could reasonably have foreseen a negative cash flow based on the rent schedule then in existence within the one year period following acquisition. This paragraph shall only apply to that portion of the negative cash flow reasonably foreseeable within the one year period following acquisition of a controlled rental unit and shall only apply to controlled rental units acquired after the date of adoption of this Article.

(h) No landlord shall increase rent under this Article if the landlord:

(1) Has failed to comply with any provision of this Article and/or regulations issued thereunder by the Board, including the provisions requiring the payment of registration fees and registration penalties.

(2) Has failed to comply substantially with any applicable State or local housing, health or safety law. No landlord shall increase rent unless the notice increasing rent contains a statement in substantially the following form: "The undersigned (landlord) certifies that this

unit and common areas are not subject to any uncorrected citation or notices of violation of any State or local housing health, or safety laws issued by any goverment official or agency." If a landlord fails to comply with this Subsection, the tenant may refuse to pay the improperly noticed increase, may seek administrative or civil remedies under this Article, and may raise the landlord's noncompliance as an affirmative defense in any resulting unlawful detainer action.

(i) The Board may, in its discretion, enact regulations to provide for increases of rents on units voluntarily vacated after the effective date of this Subsection in properties where the landlord has dedicated a percentage of units to be rented to persons of very low or low income at affordable rents. The Board may enact procedures and other regulations governing determination of the conditions upon which such increases will be permitted, the extent of the increases, the required mix of affordable units to be provided, ways to ensure the continued provision of affordable housing under this Subsection, the terms and conditions applicable when landlords cease to participate or when tenants vacate or cease to qualify for units dedicated to affordable housing, and other measures it deems necessary.

If the Board enacts regulations under this Subsection, its shall provide for the following:

(1) That a property shall not be eligible for this program unless a specified percentage of all units on the property, no less than 15 percent, will be occupied by tenants of very low or low

income and the rent on each unit so occupied does not exceed a specified percentage, no greater than 30 percent, of such tenants' income.

(2) That tenants of very low or low income occupying units maintained at affordable rent levels under this program are protected if the landlord elects not to participate further in the program. Such protection shall include, at a minimum, a provision prohibiting the rent of such tenants from being increased by a percentage greater than the general annual adjustment allowed by the Board even if the resulting rent is below the maximum allowable rent and the landlord has lowered the rent for other units on the property.

SECTION 1806. **Eviction.** No landlord shall take action to terminate any tenancy including service of any notice to quit or other eviction notice or bring any action to recover possession or be granted recovery of possession of a controlled rental unit unless:

(a) The tenant has failed to pay the rent to which the landlord is entitled under the rental housing agreement and this Article.

(b) The tenant has violated an obligation or covenant of his or her tenancy other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord in the manner required by law.

(c) The tenant is committing or expressly permitting a nuisance in, or is causing substantial damage to, the controlled rental unit, or is creating a substantial interference with the

comfort, safety, or enjoyment of the landlord or other occupants or neighbors of the same.

(d) The tenant is convicted of using or expressly permitting a controlled rental unit to be used for any illegal purpose.

(e) The tenant, who had a rental housing agreement which had terminated, has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms as are not inconsistent with or violative of any provisions of this Article and are materially the same as in the previous agreement.

(f) The tenant has refused the landlord reasonable access to the controlled rental unit for the purposes of making necessary repairs or improvements required by the laws of the United States, the State of California or any subdivision thereof, or for the purpose of showing the rental housing to any prospective purchaser or mortgagee.

(g) The tenant holding at the end of the term of the rental housing agreement is a sub-tenant not approved by the landlord.

(h) The landlord seeks to recover possession in good faith for use and occupancy by herself or himself, or her or his children, parents, grandparents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law. For purposes of evictions under this Subsection:

(1) A "landlord" shall be defined as a natural person who has at least a fifty (50) percent ownership interest in the property.

(2) No eviction may take place if any landlord or enumerated relative already occupies one unit on the property, or if a vacancy already exists on the property and the vacant unit is comparable to the unit for which eviction is sought. Where the vacant unit is determined not to be comparable, thereby permitting eviction under this Subsection, the evicted tenant or tenants shall be first given the right to occupy the vacant unit and the rent thereof shall be the lesser of the maximum allowable rent for the vacant unit and the maximum allowable rent of the unit from which the tenant or tenants are evicted. The Rent Control Board shall promulgate regulations defining when a unit is comparable for purposes of this paragraph.

(3) The notice terminating tenancy shall contain the name, address and relationship to the landlord of the person intended to occupy.

(4) The landlord or enumerated relative must intend in good faith to move into the unit within thirty (30) days after the tenant vacates and to occupy the unit as a primary residence for at least one year. The Board may adopt regulations governing the determination of good faith.

(5) If the landlord or relative specified on the notice terminating tenancy fails to occupy the unit within thirty (30) days after the tenant vacates, the landlord shall:

(i) Offer the unit to the tenant who vacated it.

(ii) Pay to said tenant all reasonable expenses incurred in moving to and/or from the unit.

(6) No eviction pursuant to this Subsection shall be allowed in any condominium or stock cooperative unit which has been converted from an apartment or other rental unit after April 10, 1979, unless the Rent Control Board has issued a removal permit or declared a vested right for said unit. As used in this subpart, a unit shall be deemed converted after April 10, 1979, if on April 10, 1979 the recorded tract map or parcel map for the property showed the unit as included in the property.

(i) The landlord seeks to recover possession to demolish or otherwise remove the controlled rental unit from rental residential housing use after having obtained all proper permits from the City of Santa Monica.

Notwithstanding the above provisions, possession shall not be granted if it is determined that the eviction is in retaliation for the tenant reporting violations of this Article, for exercising rights granted under this Article, including the right to withhold rent upon authorization of the Board under Section 1803(q) or Section 1809 or for organization other tenants. In any notice purporting to terminate tenancy the landlord shall state the cause for the termination, and in any action brought to recover possession of a controlled rental unit, the landlord shall allege and prove compliance with this Section.

Any violation of this Section shall render the landlord liable to the tenant in a civil action for

actual and punitive damages. The prevailing party in an action based upon this Section shall recover costs and attorneys fees.

SECTION 1807. **Non-Waiverability.** Any provision, whether oral or written, in or pertaining to a rental housing agreement whereby any provision of this Article for the benefit of the tenant is waived, shall be deemed to be against public policy and shall be void.

SECTION 1808. **Judicial Review.** A landlord or tenant aggrieved by any action or decision of the Board may seek judicial review by appealing to the appropriate court within the jurisdiction.

SECTION 1809. **Civil Remedies.**

(a) Any landlord who demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this Article or any rule, regulation or order hereunder promulgated, including the provisions ensuring compliance with habitability standards and registration fee requirements, shall be liable in a civil action to the tenant from whom such payments are demanded, accepted, received or retained, for reasonable attorney's fees and costs as determined by the court, plus damages in the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent. A civil penalty of treble the amount by which the payment or

payments demanded, accepted, received or retained exceeds the maximum lawful rent shall be awarded against the landlord upon a showing that the landlord has acted willfully or with oppression, fraud or malice. No administrative remedy need be exhausted prior to filing suit pursuant to this Subsection.

(b) In lieu of filing a civil action, a tenant may file an administrative complaint. The Board shall establish by rule and regulation a hearing procedure similar to that set forth in Section 1805(d).

(1) The rules and regulations adopted by the Board shall provide for final Board action on any complaint for excess rent within one hundred and twenty (120) days following the date of filing of the complaint.

(2) In any administrative hearing under this Section, a landlord who demands, accepts, receives or retains any payment of rent in excess of the maximum lawful rent shall be liable for damages in the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent and may be liable for an additional amount not to exceed five hundred dollars ($500.00), for costs, expenses incurred in pursuing the hearing remedy, damages and penalties. The tenant shall bear the burden of proving entitlement to the penalty. The tenant may deduct the penalty and award of damages from future rent payments in the manner provided by the Board. An order authorizing rent withholding under this Article shall survive

the sale or other transfer of the property and shall be binding upon successors of the landlord against whom the order was made. If a tenant authorized to withhold rent under this Article vacates the property, the landlord shall pay to such tenant a sum equal to the balance of the rent that the tenant could have withheld.

(c) If the tenant from whom such excessive payment is demanded, accepted, received or retained in violation of the foregoing provisions of this Article or any rule or regulation or order hereunder promulgated fails to bring a civil or administrative action as provided for in Section 1809 (a) and 1809 (b) within one hundred and twenty (120) days from the date of occurrence of the violation, the Board may settle the claim arising out of the violation or bring such action. Thereafter, the tenant on whose behalf the Board acted is barred from also bringing an action against the landlord in regard to the same violation for which the Board has made a settlement or brought action. In the event the Board settles said claim, it shall be entitled to retain the costs it incurred in settlement thereof, and the tenant against whom the violation has been committed shall be entitled to the remainder.

(d) The appropriate court in the jurisdiction in which the controlled rental unit affected is located shall have jurisdiction over all actions brought under this Section.

SECTION 1810. **Criminal Remedies.** Any landlord violating this Article shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisions of this Article shall be punished by a fines of not more than five hundred ($500.00) dollars or by imprisonment in the county jail for a period not exceeding six months, or by both such fine and imprisonment.

SECTION 1811. **Injunctive and Other Civil Relief.** The Board, and tenants and landlords of controlled units, may seek relief from the appropriate court within the jurisdiction within which the affected controlled rental unit is located to enforce any provision of this Article or its implementing regulations or to restrain or enjoin any violation of this Article and of the rules, regulations, orders and decisions of the Board.

SECTION 1812. **Partial Invalidity.** If any provision of this Article or application thereof to any person or circumstances is held invalid, this invalidity shall not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable. This Article shall be liberally construed to achieve the purposes of this Article and to preserve its validity.

SECTION 1813. **Relationship to Article XX.** Section 1803(t) of this Article shall not apply to any building for which approval has been received pursuant to Article XX (Tenant Ownership Rights Charter Amendments) of this Charter. All other provisions of this Article, however, shall continue to apply with full force and effect to each unit in any building receiving approval pursuant to Article XX.

Tenants residing in such units, whether or not "qualifying," "participating," or any other such designation under Article XX, shall enjoy all the rights and remedies provided by this Article without limitation as to duration or to ownership of the unit. This Section is declarative of existing law and does not impose any new requirements or limit any existing ones.

SECTION 1814. **Existing Board Practices.** To the extent that the amendments to Article XVIII adopted at the same time as this Section incorporate rules, regulations and practices of the Rent Control Board existing on the date of the adoption hereof, this amendment is declarative of existing law and does not impose any new requirements or limit any existing ones.

SECTION 1815. **Single Family Homes.** Single family homes that were not used for residential rental purposes on July 1, 1984 are automatically exempt from the provisions of this Article. Single family homes that are not exempt under the preceding sentence are subject to all requirements of this Article, but shall be permanently exempted by the Board upon proof that the home has been continuously

occupied by the owner for a period of two (2) years as a principle place of residence after voluntary vacancy by the tenant or lawful eviction of the tenant. An owner may have only one exemption under this Section at any one time.

SECTION 1820. **State Owned Property.** This Article shall not apply to any property which is part of the State Park System or sovereign tidelands and owned by the State of California on July 1, 1990.

APPENDIX B

CHAPTER 2

DEFINITIONS

2000. The following words or phrases, as used in the Rent Control Charter Amendment or these Regulations shall have the following meanings:

2001. Owner-Occupied Dwellings

For the purposes of determining exemptions for owner-occupancy under §1801(c)(4) of the Rent Control Charter Amendment:

(a) An owner-occupant must occupy the housing unit in good faith, as the principal place of residence.

(b) No corporation, trust, partnership, or association can be considered an owner-occupant.

(c) A person may be considered an owner-occupant only if said person owns at least a 50% interest in the property.

(d) The dwelling must contain no more than three units on one legal parcel, including units contained in separate buildings on the same parcel.

. . . . .

2004. Privileges as Housing Services and Material Terms

As defined in subsection 1801(d) of the Rent Control Law, the etrm "housing service" includes "any . . . privilege . . . connected with the use or occupancy of any rental unit." Such privileges include, but are not limited to, the following:

a. The right to have roommates;

b. The right to have overnight guests;

c. The right to have pets.

Reduction of such services may be grounds for a rent decrease pursuant to subsection 1805(e) of the Rent Control Law and Chapter 4 of these Regulations. In addition, such housing services shall be considered material terms of any rental housing agreement for the purposes of subsection 1806(e) of the Rent Control Law.

[2004 Adopted 6/1/89; Effective 6/10/89]

[Chapter 2 Adopted 11/29/79; Effective 12/4/79]

CHAPTER 9.

EVICTIONS

9000. Scope of Regulations.

These regulations are designed to implement and clarify the just cause eviction requirements of §1806 of the Santa Monica City Charter. The authority for promulgation of these regulations derives from §1803(g) of the Santa Monica City Charter.

. . . . .

[9002] (j). A landlord shall not attempt to recover possession of a unit pursuant to Section 1806(h) where there is a comparable unit occupied by a tenant who moved onto the property where the unit is located more recently than the tenant from whom the landlord seeks to recover possession. For purposes of this provision, "comparable unit" shall mean a unit of the same number of bedrooms, with substantially the same amenities and housing services, and with square footage that varies no more than fifteen percent (15%) from the unit for which the landlord is attempting to recover possession.

[9002(j) Adopted 6/1/89; Effective 6/10/89]

. . . . . .

9007. No tenancy may be terminated for violation of a covenant of a rental agreement, other than the covenant to pay the lawful rent, unless that covenant was the result of an express agreement between the landlord and tenant. An express agreement must be in writing, signed by both parties and the tenant must have knowingly consented to the change. A landlord may not unilaterally change the terms of tenancy under Civil Code §827 and then evict the tenant for violation of the added covenant unless the tenant has agreed in writing to the additional covenant.

. . . . . .

[Chapter 9 Amended 4/13/89; Effective 4/23/89]

FOR ARGUMENT

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No. 90-1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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Petitioners,

v.

THE CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

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BRIEF *AMICI CURIAE* OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES AND THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENT

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BRIEF *AMICI CURIAE* OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES AND THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, we file this brief as *amici curiae* in support of respondent City of Escondido. Letters of consent from counsel for the parties have been filed with the Clerk.

Amici are organizations concerned with the protection and conservation of the nation's historic and natural environment, and with land use regulation and planning that serves to protect the character of America's cities, towns, and countrysides. *Amici* seek to encourage environmentally and economically sound land use policies at all

levels of government. *Amici* seek to preserve the authority of federal, state, and local governments to adopt or apply regulations necessary, in the public interest, to promote these policies.

The National Trust for Historic Preservation ("National Trust") was chartered by Congress in 1949 as a private charitable and educational organization to further the historic preservation policy of the United States and to "facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest." 16 U.S.C. §§ 461, 468 (1988). Congress intended that "[the National Trust] will mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources." S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2285, 2288. The National Trust has more than 250,000 individual members, including 23,000 members who reside in the State of California, as well as some 6,600 member organizations nationwide.

The American Planning Association ("APA") is a nonprofit public interest and research organization representing over 27,000 practicing planners, elected and appointed officials, and citizens involved with urban and rural planning issues. Many of the APA's members are involved in the day-to-day formulation of planning policies and the preparation of land use regulations.

Both the APA and the National Trust have a vital interest in securing judicial decisions that ensure the continued validity and effectiveness of regulatory protections for historic properties and regulations that otherwise serve to protect the character of America's cities, towns, and countrysides. To this end, the National Trust, through its Legal Defense Fund, maintains an active legal advocacy program to ensure the effective application of federal, state, and local laws that protect historic resources, and to uphold the constitutionality of such laws under both the U.S. Constitution and the constitutions of

the various states. Since 1970, the National Trust has participated in nearly 70 cases in federal and state courts, including six cases before this Court involving challenges to governmental regulatory authority under the Takings Clause of the Fifth Amendment.*

SUMMARY OF ARGUMENT

Petitioners rent their property for occupancy by stationary mobile homes. Under California law and an ordinance of the City of Escondido, they are free to leave that business at any time, but while they remain in the business they may charge tenants only "just, fair and reasonable" rents and may not terminate a tenant without cause or refuse without cause to accept the purchaser of a tenant's mobile home as a successor tenant. Petitioners, who have not applied for any rent increase, concede the constitutionality of rent control in general and as applied for the benefit of existing tenants. Their contention, in essence, is that on its face the ordinance "takes" a property interest consisting of the value of the difference between (a) the "just, fair and reasonable" rents they will be permitted to charge second and succeeding tenants, and (b) whatever rents the market might turn out to bear.

I. The ordinance plainly does not cause a "permanent physical occupation" of petitioners' property within the meaning of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This Court has applied that term only to regulations that require wholly uninvited physical intrusions. Petitioners, unlike the complainants in *Loretto*, *Nollan*, and *Kaiser Aetna*, have suffered *no* uninvited physical presence on their property: the business

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* *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

in which they are voluntarily engaged inherently entails the physical presence of mobile homes and their owners on petitioners' land. Petitioners are therefore in the same position as the complainants in *PruneYard* and *Florida Power Corp.* and numerous other regulated property owners: having opened their property to the physical use that is being made of it, they may challenge applicable regulations as going "too far" under the Court's traditional multifactor analysis, but they cannot claim a physical invasion.

Attempting to apply the "permanent physical occupation" rule to regulations that do not impose any uninvited physical presence on property would be a serious mistake. Forcing an owner to accept wholly uninvited persons or things on his property is, regardless of other circumstances, an inherently severe intrusion—a denial of his basic right to exclude others. Regulation of an owner who has not sought to exclude others may go "too far," but whether it does depends on circumstances and requires a multifactor analysis. A cardinal virtue, noted in *Loretto*, of the "permanent physical occupation" test is that it draws a bright line around a set of clear cases. Departing from the requirement of an uninvited physical presence would deprive the test of its clarity and future usefulness.

II. The ordinance does not deny mobile home park owners economically viable use of their property. To the contrary, the ordinance allows petitioners to charge tenants "just, fair and reasonable" rents for a voluntary and terminable use of their land. The suggestion of certain *amici* that in the future the Escondido Mobilehome Park Rental Review Board might not in fact allow "just, fair and reasonable" rents is wholly irrelevant to this facial challenge.

Petitioners and their *amici* therefore attempt to shrink the "denominator of the fraction." They argue, in various ways, that for purposes of takings law analysis the relevant "parcel" of property *is* the difference between

"just, fair and reasonable" rents and whatever higher rents the market might turn out to bear. And they say, in essence, that the ordinance goes "too far" because it deprives them of "all" of this "parcel."

On the face of it, this is an extraordinary claim. This Court has generally looked to the "parcel as a whole" and has resisted attempts to carve up an economically integrated unit into separate property interests for purposes of takings law analysis, even where (as in *Penn Central* and *Keystone*) physically separate portions of the property were at issue. The interest in collecting *more* than a "just, fair and reasonable" rent is certainly not an interest recognized as distinct under state law, or about which petitioners could logically have distinct "reasonable" investment-backed expectations. More fundamentally, if the very rights that are denied by an otherwise lawful regulation are posited to be *the* relevant property for purposes of takings law analysis, then every price ceiling and a great many other regulations effect express takings.

Petitioners argue that in Escondido the right to collect rents in excess of "just, fair and reasonable" levels *has become* a separate property interest, because (they say) the Escondido ordinance has not merely denied the park owners excess rents but conveyed the right to collect them to existing tenants, who can transfer that right to their successors. But existing tenants have received no such right, either *de jure* or *de facto*. Unlike an unregulated landlord, who can charge tenants whatever the market turns out to bear over time (or bargain away that right by granting a long-term lease at an acceptably high rent), a tenant selling a mobile home cannot assure his purchaser of any level of rents or any period of tenure: the Escondido Board may grant the park owner substantial rent increases at any time or times, without regard to the interests or expectations of any tenant, and the park owner is free to leave the business at any time. The fact that

pad rents are subject to "just, fair and reasonable" limits may affect the prices at which mobile homes are sold, but all sorts of regulations have beneficial effects on the market values of properties held by other persons without creating separate "parcels" for purposes of takings law analysis.

III. Petitioners concede that the ordinance substantially advances a legitimate governmental interest with respect to existing tenants: it protects them against the substantial bargaining leverage (stemming from the zoning-induced scarcity of sites and the *im*mobility of "mobile" homes) that might otherwise enable the park owner to charge exorbitant rents and impose other excessively onerous conditions.

Petitioners argue, however, that the ordinance ceases to serve any such interest after the first tenancy, because (they say) the first tenant can add the value of all future excess rents to the price at which he sells his mobile home, depriving the second and subsequent tenants of the protection of the ordinance. But, first, even if that were true, the ordinance would serve the substantial continuing purpose of preventing the park owner from exploiting the immobility of the mobile home at the time of sale, by raising rents and driving down the selling price of the mobile home to less than its fair value. And more importantly, the ordinance plainly does protect second and subsequent tenants against the landlord's continuing ability to exploit conditions of scarcity and immobility to extract exorbitant rents; the protection may not be perfect, but it is clearly substantial because existing tenants (who may be constrained by their own needs to relocate and in any event cannot assure either future rent levels or any period of tenure) plainly cannot extract all or most of the value of that protection when they sell their mobile homes.

Finally, petitioners' claim would entirely disappear (although petitioners would not be a penny richer) if Escondido were to enact an *additional* ordinance limiting the

sales prices of mobile homes to the amounts that could be collected if pad rents were not controlled. But a regulation does not effect a "taking" merely because it leaves some persons unregulated and therefore may not fully achieve its objectives. A regulation effects a taking if it imposes a burden that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A landowner able to charge "just, fair and reasonable" rents for a voluntary and terminable use of his land simply cannot claim that he bears any such burden.

ARGUMENT

Petitioners are engaged in the business of renting their property for occupancy by stationary mobile homes. The Escondido Municipal Code, Article V, Sections 1-9, J.A. 21-30 (the "ordinance"), permits a person engaged in that business to charge a first tenant, and every succeeding tenant, a "just, fair and reasonable" rent as determined and redetermined from time to time.[1] It forbids petitioners, as long as they are engaged in that business, from charging whatever additional rent the market might bear. Together with California's Mobilehome Residency Law, Cal. Civ. Code §§ 798 *et seq.* (West 1982 & Supp. 1991) (Pet. App. D), the ordinance also forbids park owners from terminating tenants without cause[2] or re-

[1] *See* Ordinance § 4(g), J.A. 25-27. The ordinance lists eleven factors to be considered in determining a "just, fair and reasonable" rent. Each factor relates to economic fairness to the landlord, without regard to the economic circumstances of the tenant. *Cf. Pennell v. City of San Jose*, 485 U.S. 1, 20-24 (1988) (Scalia, J., concurring and dissenting). Petitioners have challenged the ordinance on its face, without applying for a rent increase, and for purposes of the present case it must be assumed that the factors in the ordinance would be applied in a constitutional manner to produce a "just, fair and reasonable" rent. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-96 (1987).

[2] The Mobilehome Residency Law provides that a mobile home park owner may terminate a tenancy for: (a) failure to comply

fusing without cause to accept purchasers of mobile homes as successor tenants.[3] Petitioners are free to leave the mobile home park business at any time on reasonable notice and to devote their property to other uses. *See* Cal. Civ. Code §§ 798.55, 798.56(g), 798.57.

Petitioners properly concede (Br. 7) that they have no general constitutional right to charge more than a "just, fair and reasonable" rent.[4] They do not dispute the public purpose underlying mobile home park rent controls, i.e., to assure that a park owner's substantial bargaining leverage, stemming from the tenant's placement of his expensive and largely *im*mobile home in the park and from a zoning-induced scarcity of sites, does not enable the park owner to charge exorbitant rents.[5]

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with a local ordinance or state law or regulation relating to mobile homes; (b) conduct on park premises that constitutes a substantial annoyance to other mobile home owners or residents; (c) conviction of the mobile home owner or resident for certain offenses in the park; (d) failure to comply with a reasonable rule or regulation that is part of the rental agreement; (e) nonpayment of rent, utility charges, or reasonable incidental service charges; (f) condemnation of the park; or (g) change of use of the park. Cal. Civ. Code §§ 798.55, 798.56. The ordinance contains similar restrictions that apply to tenancies not subject to the California statute. Ordinance § 6, J.A. 28-29.

[3] The Mobilehome Residency Law provides that the park owner may reject a successor tenant if that tenant does not have the ability to pay the rent or if the owner determines that the tenant will not comply with park rules. Cal. Civ. Code § 798.74. It also provides that a park owner may require removal, at the time of sale, of a mobile home not meeting specified age, size, and safety requirements. *Id.* § 798.73.

[4] *See, e.g., Pennell*, 485 U.S. at 12 n.6.

[5] *See* Cal. Civ. Code § 798.55(a); Note, *The Community and the Park Owner Versus the Mobile Home Park Resident: Reforming the Landlord-Tenant Relationship*, 52 B.U.L. Rev. 810 (1972); Note, *Mobile Home Park Practices: The Legal Relationship Between Mobile Home Park Owners and Tenants Who Own Mobile*

Petitioners also do not contend that they have a constitutional right, as long as they remain in the mobile home park business, to terminate existing tenants without cause, or to refuse without cause to accept purchasers of mobile homes as successor tenants.[6] A legislature could properly find (as Escondido's City Council did, *see* J.A. 33) that, since a "mobile" home often cannot be moved at reasonable cost, the right to terminate a lease without cause, or to refuse without cause to allow the tenant who owns the home to sell it in place to another tenant, would unfairly put the mobile home owner at the mercy of the park owner during the tenancy and at the time of sale.

Petitioners' claim is that the combination of otherwise constitutional rent controls and otherwise constitutional tenure/successorship provisions allows an existing tenant to obtain from a purchaser of his mobile home some portion of an element of value they say belongs to them. Specifically, the "property" they claim has been taken is the value of the difference between (a) the "just, fair and reasonable" rents, determined over time, that may be

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Homes, 3 Fla. St. U. L. Rev. 103, 104 (1975); *Stewart v. Green*, 300 So. 2d 889, 892 (Fla. 1974) (recognizing park owners' "overriding economic advantage over tenants"); *cf.* Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 406-11 (1988) (recognizing mobile home rent controls exist in 75 California jurisdictions); *Pennell*, 485 U.S. at 20 (Scalia, J., concurring and dissenting).

[6] For example, petitioners do not complain that the ordinance's "Permissible Reasons for Terminating or Refusing to Renew a Tenancy," Ordinance § 6, J.A. 28-29, fail to include any matter that should count as reasonable cause. The primary restrictions are contained in the California statute, Cal. Civ. Code §§ 798.55, 798.56, 798.73, 798.74, whose constitutionality is not placed in issue by any of petitioners' Questions Presented. The Escondido ordinance applies some of these restrictions to tenancies not covered by the statute, *see* Ordinance § 6(a), J.A. 28, but petitioners do not challenge this feature of the ordinance.

charged to the second and succeeding tenants,[7] and (b) whatever rents the market might turn out to bear.

Ironically, petitioners' claim depends entirely on the failure of the ordinance to go further than it does: if the City of Escondido enacted a "Mobile Home *Sales Price* Control Ordinance," barring a tenant from charging more than he could collect if his mobile home "pad" rent were not controlled—and thus assuring succeeding tenants the full benefit of whatever the controlled pad rents turn out to be—petitioners would not be a penny richer, but their constitutional claim would disappear.

We argue in Part I that Escondido's regulation of the landlord-tenant relationship does not involve a "permanent physical occupation." In Part II, we argue, first, that an ordinance which allows a "just, fair and reasonable" return provides an "economically viable use" of property and, second, that petitioners cannot treat the right to collect *more* than a "just, fair and reasonable" rent as a separate "parcel" (what one *amicus* calls a "marketable servitude") for purposes of takings law analysis. In Part III, we argue that the ordinance substantially advances a legitimate governmental interest after, as well as during, the first tenancy.

I. THE ESCONDIDO ORDINANCE DOES NOT AUTHORIZE A "PERMANENT PHYSICAL OCCUPATION" OF PROPERTY

As mobile home park owners, petitioners have voluntarily chosen to devote their property to a business use that inherently entails the physical presence of structures and persons (mobile homes and their owners) on their land. Petitioners are similar in this respect to many other property owners—such as apartment landlords, innkeepers, shopping center operators, restauranteurs, and com-

[7] Petitioners do not claim any constitutional right to collect this excess rent during the length of time that the first tenant remains on the property.

mon carriers—who have invited certain categories of persons and things onto their property and find the terms of that invitation subject to regulation. Whatever else may be said about any such regulation, treating it as "permanent physical occupation" is inconsistent with this Court's past use of that term and would rob the term of its future usefulness.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court announced a "very narrow," *id.* at 441, exception to the usual multifactor regulatory takings inquiry in cases where a regulation authorizes what the Court called a "permanent physical occupation." But the Court made it clear that the term "permanent physical occupation" applies only to *wholly uninvited intrusions*. The Court stressed that the television cable installation requirement at issue meant that a "*stranger* [a ½" cable wire and box] directly invades and occupies the owner's property." *Id.* at 436 (emphasis in original). The Court distinguished *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), on the ground that a shopping center owner desiring to prevent invasion by individuals seeking to exercise free speech and petition rights "had not exhibited an interest in excluding all persons from his property" and "had already invited the general public." *Loretto*, 458 U.S. at 434. In those circumstances, the Court said, "the fact that the solicitors may have physically invaded the owners' property cannot be viewed as determinative." *Id.* (quoting *PruneYard*, 447 U.S. at 84) (brackets omitted).[8] Speaking

[8] The Court cited a number of cases, many of which *did* involve the physical presence of persons or objects not individually invited or wanted by the property owner, for the proposition that landlord-tenant relationships are not governed by the "physical occupation" rule. *See* 458 U.S. at 440 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Ass'n v. Blaisdell*,

directly to regulation of landlord-tenant relations, the *Loretto* Court said that where such regulations do not require the landlord to suffer an uninvited physical occupation of a portion of his building by a third party, "they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Loretto*, 458 U.S. at 440.

Later cases have reiterated this point. In *FCC v. Florida Power Corp.*, 480 U.S. 245, 252-53 (1987), the Court rejected a challenge, based on *Loretto*, to a requirement that utility poles carry a cable at a regulated rent of $1.79 rather than the $7.15 rent offered by the utility. The Court said, "it is the invitation, not the rent, that makes the difference." *Id.* at 252. Similarly, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), while invalidating a requirement that landowners grant an easement over their property that was unrelated to the regulatory purpose asserted by the state, the Court distinguished *PruneYard* on the ground that the shopping center owner "had already opened his property to the general public." *Id.* at 832 n.1.[9]

The Court's distinction between regulations imposing uninvited physical invasions and the regulation of a prop-

290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control)).

[9] Indeed, *Nollan* makes it clear that otherwise valid regulation of an activity in which a landowner chooses to engage *may* involve a permanent physical presence on the landowner's property without triggering the per se "permanent physical occupation" rule. While invalidating a requirement that a landowner grant an unrelated easement as the price for obtaining a building permit, the *Nollan* Court said that if the state had imposed a condition whose purpose was the assumedly proper one of assuring continuing visual access to the ocean, "the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot *on their property* for passersby with whose sighting of the ocean their new house would interfere." 483 U.S. at 836 (emphasis added).

erty owner's relationship with an invited public makes obvious sense. Forcing a property owner to accept a wholly uninvited presence on his property, denying him the basic right to exclude others, is a clear-cut and severe "per se" intrusion on his rights. Where a property owner has not sought to exclude other persons or objects from his property, otherwise valid regulation of his relationship with those persons and objects is not inherently a severe intrusion, and whether it goes "too far" in a particular case plainly depends on the circumstances, warranting a multifactor inquiry.[10]

Petitioners here, like the shopping center owner in *PruneYard* and unlike the petitioners in *Loretto* and *Nollan*, invited the physical use of their property in exactly the physical way it is being used.[11] They are not seeking to terminate or otherwise change that physical use (which they could do if they wished, *see* p. 8,

[10] Petitioners and their *amici* get no help from their repeated citations of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Stripped of the "navigational servitude" issues (which were central to that case but are irrelevant here), *Kaiser Aetna* involved a federal command that private land be permanently opened to free use by a wholly uninvited general public. If the federal action had been a regulation of a business or activity in which the public had been invited to participate, the analysis would have been entirely different. If, for example, the government had merely required a commercial marina already serving the public at large to serve persons without regard to race or creed, or barred such a marina from declining to serve any person without cause, or set fair and reasonable ceiling prices for marina services under conditions of scarcity, a taking claim would not have been analyzed in "physical occupation" terms—and probably would have been dismissed as frivolous.

[11] Petitioners obviously cannot claim that they have suffered an uninvited physical occupation merely because they must in some circumstances accept tenants not individually of their own choosing. This Court would have little difficulty, for example, with a claim that a mobile home park owner, or an apartment owner, suffers a permanent physical occupation merely because he cannot reject tenants on account of race or religion.

supra).[12] Their objection is solely to the economic terms on which they are required to conduct the business in which they have chosen to engage. A complaint solely about economic regulation does not involve the "special kind of injury" that results from physical invasion. *Loretto*, 458 U.S. at 436.

More importantly, the term "permanent physical occupation," which now draws a bright line around cases where the invasion is truly a physical one, would cease to draw any intelligible line at all if it were potentially applicable to all economic regulation that touches on the physical use of property, where the physical use is not itself uninvited.[13] This Court stressed in *Loretto* that one reason for the "permanent physical occupation" rule is that it "avoids otherwise difficult line-drawing problems" and "presents relatively few problems of proof." *Id.* at 436, 437. Petitioners' attempt to apply the per se "permanent physical occupation" rule to the complexities of the landlord-tenant relationship would obliterate the very

[12] In *Loretto*, the Court noted that it was not a valid objection to petitioner's taking claim that she could avoid the cable attachment requirement "by ceasing to rent the building to tenants." 458 U.S. at 439 n.17. But the objection would have been perfectly valid if the physical presence to which the petitioner in that case objected had been the occupation of the building by tenants. Since she objected only to the presence of a wholly uninvited cable wire and box, it would hardly have been fair to suggest that she could avoid the objectionable intrusion by giving up her basic business. Here, in contrast to *Loretto*, the only physical occupation at issue—the presence of mobile homes and their owners on petitioners' land—is physically inherent in the business to which they have voluntarily devoted their property.

[13] The rent difference at issue in this case is of course not property that is capable of being physically occupied. *Cf. United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (holding that taking a percentage of a monetary award from recipient is not a physical occupation of property, since "[u]nlike real or personal property, money is fungible.").

features that make the rule useful.[14] This is a case that, as the Court said in *Loretto*, must be "analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Id.* at 440.

II. THE ESCONDIDO ORDINANCE DOES NOT DENY MOBILE HOME PARK OWNERS ECONOMICALLY VIABLE USE OF THEIR PROPERTY

The Court has developed a two-pronged test to determine whether a regulation affecting the use of private property "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and becomes a taking. A regulation "does not effect a taking if it substantially advance[s] legitimate state interests and does not den[y] an owner economically viable use of his land." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quotation marks omitted); *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). We take up "economically viable use" in this part and "legitimate state interests" in Part III.

A. The Escondido Ordinance Allows Petitioners to Collect "Just, Fair and Reasonable" Rents

On its face, the Escondido ordinance allows petitioners to collect a "just, fair and reasonable" rent for each pad in their mobile home parks, determined on the basis of factors reflecting their economic situation as park owners.[15] Petitioners also have the right under the California statute to go out of the mobile home park business and devote their property to other uses they find more profit-

[14] Indeed, one *amicus* now suggests that if rent control of mobile home parks constitutes a per se taking, then rent control of apartment housing must also constitute a per se taking. *See* Brief of Amicus Curiae The Apartment Association of Greater Los Angeles at 3-7.

[15] *See* note 1, *supra*.

able.[16] It could hardly be clearer that petitioners have not been denied economically viable use of their land.

The Court has found that a regulation denies "economically viable use" of property only when it denies the owner a "reasonable return" on his investment, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978), or otherwise renders use of the property "commercially impracticable." *Keystone*, 480 U.S. at 493, 499. In *Penn Central*, the Court upheld the city's landmark preservation ordinance on the ground, *inter alia*, that it permitted Penn Central "not only to profit from the [Grand Central] Terminal but also to obtain a 'reasonable return' on its investment." 438 U.S. at 136. By expressly permitting a "just, fair and reasonable" rent, the Escondido ordinance easily passes the economic viability test developed by the Court.

Sensing this weakness in petitioners' case, certain *amici*[17] suggest that the rents actually allowed in future proceedings under the ordinance may not in fact be "just, fair and reasonable." That suggestion is obviously irrelevant to this facial challenge. Petitioners have not applied for, let alone been denied, any rent increase, and there is no basis at this stage for speculating about the reasonableness of future rents. The Court has emphasized time and again the need to postpone considering whether a regulation effects a taking until the economic impact on the property owner can be determined. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 10-11 (1988); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 349-53 (1986) (affirming decision sustaining demurrer to complaint, where zoning board had not issued final decision on permitted uses); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981). Any assumption that rents in Escondido will be inadequate in the future is wholly unwarranted.

[16] *See* Cal. Civ. Code §§ 798.55, 798.56(g), 798.57.

[17] *See, e.g.*, Brief Amicus Curiae of Western Mobilehome Association at 10 n.9; Brief of Amicus Curiae The Apartment Association of Greater Los Angeles at 13; Brief of Manufactured Housing Educational Trusts of Los Angeles County and Orange County as Amici Curiae at 19-20.

B. Petitioners Are Not Entitled to Treat the Excess Over a "Just, Fair and Reasonable" Rent as a Separate "Parcel" for Purposes of Takings Law Analysis

Obviously unable to show that they are denied an economically viable use of their parks as a whole, petitioners and their *amici* seek to shrink "the denominator of the fraction," *Keystone*, 480 U.S. at 497, to a portion of their property. They ask this Court, in various ways, to treat as a "separate parcel" the monetary value of the difference between controlled and uncontrolled rents. What petitioners have lost is the right to charge more than a "just, fair and reasonable" rent, and their argument is, in essence, that the ordinance has gone "too far" because it has taken *all* of that right.

Stated that way, this argument proves much too much. If, as petitioners and certain of their *amici* contend, any diminution in the value of their parks caused by the ordinance is the very property interest that serves as the denominator in determining whether the ordinance goes "too far," then a great many regulations effect express takings, because whatever use or element of value of property is restricted by a challenged law is the property interest at issue. For example, if the excess over every otherwise lawful price ceiling were treated as a separate property interest, "all" of which is taken by the price regulation, then every price regulation would be a taking.

Even where physically distinct portions of a parcel are involved, this Court has been consistently inhospitable to attempts to show that a regulation goes "too far" by defining the property at issue as a mere portion of an economically integrated unit. In *Penn Central*, 438 U.S. at 130-31, the Court rejected the contention that the air space over Grand Central Terminal should be considered

separately, stating that the relevant property was the "parcel as a whole—here the city tax block designated as the 'landmark site.'" Similarly, in *Keystone*, 480 U.S. at 498, the Court rejected an argument by owners of coal property that a statute requiring them to leave specified amounts of coal in place constituted a complete taking of the coal left in place. The Court followed *Penn Central*'s "parcel as a whole" doctrine, noting that the property owners had not shown that they had treated the affected coal as a separate parcel about which they had formed "reasonable 'investment-backed expectations'" and noting that the relevant property interest consisted of the owners' entire economically integrated "mining operation." *Id.* at 498-99.[18]

The property interest that petitioners would have this Court consider separately—the monetary value of rents in excess of "just, fair and reasonable" levels—is certainly not by any traditonal test a separate "parcel" for purposes of determining whether the regulation has gone "too far." The right to charge excess rents is not a property interest that park owners had ever previously

[18] This case is not like *Hodel v. Irving*, 481 U.S. 704 (1987), where a long-established "essential stick" in the bundle of property rights suffered "total abrogation." *Id.* at 716. In *Hodel*, the Court reiterated that "the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners." *Id.* at 713. The Court made it clear that even very intrusive regulation of the descent and devise of the Indian lands in question would not have effected a taking. *Id.* at 718. The Court found a taking because of: (a) the repeatedly emphasized fact that there was "a *total* abrogation" of the ancient right to pass property to one's heirs, *id.* at 717 (emphasis in original); and (b) the fact that the right was "abolished even in circumstances when [abolition would not serve] the governmental purpose sought to be advanced." *Id.* at 718. There is nothing in the Escondido ordinance that is remotely comparable to a "total abrogation": rents are subject to adjustment as circumstances warrant and are applicable only so long as petitioners choose to devote their property to use as a mobile home park. And, as discussed in Part III, *infra*, the ordinance here at all times "[serves] the governmental purpose sought to be advanced."

treated separately, nor is it an interest about which they could have formed distinct "reasonable" investment-backed expectations. *Cf. Penn Central*, 438 U.S. at 130 & n.27; *Andrus v. Allard*, 444 U.S. 51, 66 (1979). Nor, of course, is the interest of a park owner in charging excess rent an interest previously recognized under state law as distinct and separately marketable. *Cf. Keystone*, 480 U.S. at 518-19 (Rehnquist, C.J., dissenting).[19] By no traditional test is the value of excess rents a separate property interest that serves as its own "denominator."

Petitioners argue, however, that in Escondido the right to charge rents in excess of "just, fair and reasonable" levels to second and subsequent tenants *has become* a separate property interest (*amicus* Pacific Legal Foundation (PLF) calls it a "marketable servitude," PLF Br. 6), because the Escondido ordinance (they say) in effect conveys the right to collect excess rents from the landlord to the existing tenants. They construe the ordinance to provide, in substance, "L conveys to ET portion X of the rents on Blackacre in perpetuity." But the Escondido ordinance neither says nor does any such thing.

The ordinance plainly does not confer on any tenant any *de jure* right to collect any share of future rents, or any equivalent amount. The ordinance merely limits the landlord to "just, fair and reasonable" rents and requires him to accept the purchaser of a mobile home as a successor tenant unless the landlord has cause to object. Thus, while the ordinance denies the landlord the right to charge

[19] *Amicus* Pacific Legal Foundation (PLF) cites *Calahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788 (1935), for the unremarkable proposition that the right to receive rents and profits is recognized by California law as an interest inherent in the ownership of property. (PLF Br. 7.) But that is not the interest at issue here: petitioners retain the right to collect "just, fair and reasonable" rents. What they have been denied is the right to collect *excess* rent, and no case has ever treated that as a separate property interest under California or any other state law.

whatever the market will bear, it does not purport to confer that right, or any equivalent right, on a selling tenant.

Nor does the ordinance as a practical matter confer on existing tenants anything like, or economically equivalent to, the power of an unregulated landlord to raise rents at any time to reflect conditions of scarcity and tenant immobility. A selling tenant cannot assure his purchaser of any level of rents or any period of tenure. The Escondido Mobilehome Park Rental Review Board may grant the park owner substantial rent increases at any time or times and is not directed to give any weight to any tenant's need, expectations, or investment. Furthermore, the park owner may leave the business at any time of his choosing.[20] A selling tenant therefore cannot extract anything like the full value of the "excess" rents that an unregulated landlord might later be able to charge, and a purchaser (like the protagonist of petitioners' anecdote (Br. 10-11)) who pays more for a mobile home than it is otherwise worth solely to obtain a rent-controlled location may well turn out to have made a bad decision.[21]

Of course, the tenant's property—the mobile home—may at a given time sell for a higher price because the

[20] The purchaser also has no assurance that Escondido will not later decide to regulate mobile home transfer prices. For example, the State and City of New York supplement their rent control ordinances, N.Y. Unconsol. Law §§ 2100-2210 (McKinney 1987 & Supp. 1991), with prohibitions against "key money"—side payments to an outgoing tenant by an incoming tenant, in the form of excess payments for furniture or other personal property for assistance in obtaining a rent-controlled apartment. *Id.* §§ 2105.3, 2205.3. A purchaser in Escondido therefore cannot be certain that any premium he pays for a mobile home can be passed on to his successor.

[21] "One Mrs. Morrison," the protagonist in petitioners' anecdote, was certainly mistaken if she thought she was buying an interest in land: all she in fact received was the right to take her chances that the park owner would stay in the mobile home park business and that "just, fair and reasonable" rents (determined without regard to her purchase price or her needs or interests) would turn out to be a bargain.

pad rent is subject to the ordinance, but all sorts of regulations have that kind of effect on property values. In the City of Escondido, for example, electric, gas, telephone, cable, water, and sewer lines to the mobile home pads (and other residential properties) presumably must, once installed, continue to serve those pads (and other properties) indefinitely at regulated rates. That requirement of continued service at regulated rates limits the revenues of the servicing companies, and it obviously increases the prices at which the park, the pads, and mobile homes in place (and other properties) can be sold. But the companies that provide those services do not, merely because the rate ceilings imposed on them have enhanced the value of both pads and mobile homes, have any "taking" claim as long as they are allowed to charge just and reasonable rates. Petitioners, who concede that in general they may constitutionally be subjected to rent control, are not in any fundamentally different position than the entities who service their parks at regulated rates.[22]

Virtually every regulation that imposes restrictions on the use of property necessarily confers "monetizable" benefits on the owners of other property. The fact that the beneficiaries of such regulations may be said to have received a "marketable" benefit does not mean that a discrete, recognizable property interest has been created for

[22] Certain *amici* argue, as if this were dispositive, that the Escondido ordinance turns the mobile home parks into "public utilities." *See, e.g.*, Brief Amicus Curiae of California Mobile Home Parkowners Alliance at 12. But there is no sharp constitutional line between those businesses that may, and those that may not, be subjected to price regulation. Petitioners are exploiting a scarce resource for a business purpose; the resource they own is scarce in part because other land is subject to regulations that forbid mobile home park use. Although petitioners cannot constitutionally be required to devote their property indefinitely to the mobile home park business at a loss, *see Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396 (1920), they have no constitutional right to be free of regulation that protects their tenants. *Cf. Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330 (1925).

purposes of takings law analysis. And attaching a label like "marketable servitude" does not alter this conclusion. When Penn Central was required to forgo development of an office tower in order to preserve the historic Grand Central Terminal, neighboring property owners clearly received a measurable benefit that would ultimately be captured in the prices of subsequent property sales. When the coal owners in *Keystone* were forced to leave some of their coal in the ground, surface owners certainly received a "monetizable" benefit. Federal and state clean air regulations restrict factories in ways that add measurably to the selling prices of nearby homes. And factories in turn have gained transferable value from the "servitude" that requires railroads to continue to carry freight over existing lines. *See Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330 (1925). For this Court to treat facially valid rent regulation as a taking, merely because it may confer some transferable value on tenants, would be to start down the most slippery of slopes.

III. THE ESCONDIDO ORDINANCE SUBSTANTIALLY ADVANCES LEGITIMATE STATE INTERESTS EVEN IF FUTURE TENANTS MAY NOT RECEIVE EXACTLY THE SAME PROTECTION AS EXISTING TENANTS

Petitioners appear to concede that the Escondido ordinance substantially advances legitimate state interests with respect to tenants who were in possession of mobile homes at the time the ordinance was enacted. As to them, the city has a well-recognized interest in limiting pad rents to "just, fair and reasonable" levels, in order to (i) protect them against the bargaining leverage the landlord enjoys by virtue of having the tenant's expensive and virtually immobile property on his pad, and (ii) preclude the mobile home park owners from obtaining artificially high rents that may result from the scarcity of sites. *See Azul Pacifico, Inc. v. City of Los Angeles*, Nos. 90-55853, 90-56066, 1991 U.S. App. LEXIS 26335 at *20-

*21 (9th Cir. Nov. 1, 1991) (recognizing legitimacy of interest); *see also Pennell v. City of San Jose*, 458 U.S. 1, 20-24 (1988) (Scalia, J., concurring and dissenting); *Bowles v. Willingham*, 321 U.S. 503, 517-18 (1944); *Block v. Hirsh*, 256 U.S. 135, 156-57 (1921).

Petitioners argue, however, that the Escondido ordinance does not substantially advance a legitimate state interest after the end of the first tenancy, because the first tenant may be able to obtain for himself the value of the excess rents in the sale price he charges for his mobile home, depriving the subsequent tenant-buyer of the protection of the ordinance. To put the claim another way, petitioners concede that they do not have an absolute right to charge more than "just, fair and reasonable" rents but claim that if *anybody* is going to charge this excess, it must be the landlord and not the first tenant.

But the Escondido ordinance *does* serve legitimate purposes as applied to second and subsequent tenants. First, it prevents the park owner from exploiting the immobility of the mobile home at the time of any sale. Absent the ordinance, the park owner could arbitrarily raise the rent, driving down the sale price of the home itself by the amount it would cost to move it to a new site. Allowing arbitrary rent increases when a mobile home is sold could thus potentially enable the landlord to deprive the seller of a "just, fair and reasonable" price for his home.

Moreover, the ordinance offers second and subsequent tenants substantial continuing protection against the landlord's ability to exploit conditions of scarcity and immobility. Petitioners suggest that second and subsequent tenants will have paid for that protection *in whole* as part of the price of a mobile home in place, and thus will derive no net benefit from the ordinance, but that is plainly not true. An unregulated mobile home park owner, free to charge second and subsequent tenants whatever the market will bear, is in a substantially stronger position than a selling tenant, who may be constrained by his

own need to relocate and, in any event, can assure his successor only of whatever rents the Board finds "just, fair and reasonable" for such time as the park owner chooses to continue to operate the park. On its face, therefore, the Escondido ordinance offers second and subsequent tenants substantial protection, and the Court cannot strike it as failing to substantially advance a legitimate interest.

Like other price regulation, the Escondido ordinance may work imperfectly. By failing to control the prices charged by all relevant actors, it may leave some persons (here, selling tenants) in a position to extract some value that may stem from the controls imposed on other persons. That concern (and petitioners' entire claim) could be—and indeed may in the future be—eliminated by adoption of a "Mobile Home Sales Price Control Ordinance." But the result petitioners seek here is not more perfect regulation, so as to prevent first tenants from reaping any portion of the excess rents that are denied to landlords. To the contrary, they seek the right to capture the value of excess rents for themselves, which is not a demonstrably fairer, let alone constitutionally required, arrangement of the benefits and burdens of economic life.

At bottom, the answer to petitioners' claims is that economic regulation is not invalid simply because it is imperfect, because it leaves someone else unregulated, or even because it may be unwise. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70 (1968); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963); *Nebbia v. New York*, 291 U.S. 502, 539 (1934); *Block v. Hirsh*, 256 U.S. 135, 158 (1921) (Holmes, J.) ("we have no concern of course with the question whether those [regulations] were the wisest, whether they may not cost more than they come to, or will effect the result desired").

It is thus clear why petitioners go to such lengths to cloak their challenge to the Escondido ordinance in the terminology of per se "takings" of interests in real property. The regulation they challenge may or may not be wise or completely successful, but on any fair analysis it does substantially advance legitimate governmental objectives of the City of Escondido. And a regulation imposing restrictions on the use of property voluntarily devoted to that use, but granting a "just, fair and reasonable" return, cannot be said to impose a burden that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

The decision of the Court of Appeal for the State of California should be affirmed.

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No. 91-1947

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN K. YEE AND IRENE YEE, ET AL.,
Petitioners,
vs.
CITY OF ESCONDIDO, a municipal corporation
Respondent.

On Certiorari to the
California Court of Appeal
Fourth Appellate District, Division One

BRIEF OF ESCONDIDO MOBILEHOME OWNERS' POSITIVE ACTION COMMITTEE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the rent adjustment provisions of Proposition K which permit landlords to seek periodic rent increases, without limitation as to frequency or amount, on sale of mobilehomes makes the ordinance so distinguishable from the Santa Barbara and Los Angeles ordinances examined by the Ninth Circuit in *Hall v. City of Santa Barbara* (9th Cir. 1987) 833 F.2d 1270 and *Azul Pacifico, Inc. v. City of Los Angeles* (9th Cir.) 1991 U.S. App. Lexis 26335, 91 Daily Journal DAR 13599 as to render the analysis of those cases inapplicable.

2. Whether the Ninth Circuit's failure to acknowledge and examine the effect of park owners' quasi-monopolistic power to demand excessive (over market) rents in non-rent-control parks and thereby force residents to sell their homes at depressed prices renders the "premium" analysis of *Hall* and *Azul* erroneous.

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California Court of Appeal
Fourth Appellate District, Division One

BRIEF OF ESCONDIDO MOBILEHOME OWNERS' POSITIVE ACTION COMMITTEE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

This brief is submitted with both parties' written consents which have been filed with the Clerk of the Court.

INTERESTS OF THE AMICUS CURIAE

Escondido Mobilehome Owners' Positive Action Committee ("EMPAC")[1] is a non-profit association comprised of mobilehome owners in Escondido who drafted, sponsored and eventually obtained voter approval for Proposition K. Following the enactment of Proposition K, EMPAC continued in existence as an oversight committee of local park resident organizations. EMPAC is intimately involved in assisting homeowners in their dealings with park owners. It participates on their behalf in many of the hearings before the rent-control board; its officers advise mobilehome owners and park resident organizations of their rights under Proposition K and the manner in which the ordinance applies to protect these rights; EMPAC also employs counsel, such as the undersigned, to participate in litigation between homeowners and park owners for the purpose of insuring that the rights guaranteed to park residents under this legislation are given effect.

For these reasons, EMPAC is uniquely qualified to explain the homeowners' side of the issues; namely, the conditions which existed in Escondido mobilehome parks prior to the enactment of Proposition K, the reasons which motivated EMPAC's constituency to seek legislative protection, why Proposition K was necessary, and how Proposition K was intended to and is in fact being applied. Of all of the participants in this appeal, EMPAC can best explain why in this particular municipality some form of legislation was needed to balance the equities between the owners of mobilehome parks and the mobilehome owners who lived in them, and how Proposition K

[1] At the time the ordinance was enacted EMPAC stood for Escondido Mobilehome Owner's *Political* Action Committee.

operates to affect that balance, and what would happen to the largely elderly population of mobilehome residents living in Escondido if the protections afforded by Proposition K were withdrawn.

SUMMARY OF ARGUMENT

EMPAC is aware that others including respondent will discuss in a detailed and able manner the "taking" issues fundamental to this lawsuit and will, in this process, invite the Court's attention to the existing legal framework of applicable case law and precedent. EMPAC sees *no* need to repeat these arguments. Rather it will seek to elucidate a different aspect of the controversy in the hope that a view from another perspective may provide insights to the Court not available through more traditional technical approaches.

Proposition K is significantly distinguishable from the two ordinances discussed in *Hall v. City of Santa Barbara* (9th Cir. 1987) 833 F.2d 1270 and *Azul Pacifico, Inc. v. City of Los Angeles* (9th Cir.) 1991 U.S. App. Lexis 26335, 91 Daily Journal DAR 13599. Notwithstanding the reasoning of *Hall* and *Azul*, Proposition K does not affect a taking under the principles enunciated in those two cases. Unlike the ordinances in *Hall* and *Azul*, Proposition K contains an effective rent adjustment provision operative upon the occurrence of a vacancy which allows a park owner to seek and obtain a rent increase. Thus, the ordinance here under consideration incorporates a form of vacancy decontrol which provides a balanced approach to the protection of the rights both of the park owners and the homeowners. Proposition K permits the park owner to seek a rent increase when a mobilehome is sold and if the sale includes a premium of the type envisioned by *Hall* and *Azul*, it allows the park owner to base his request for a rent increase on that

premium. Because of this adjustment feature, premiums[2] will be eliminated or at least minimized and therefore the benefits of the rent-control ordinance will be passed on to succeeding generations of homeowners.

The court which decided *Hall v. City of Santa Barbara, supra*, and *Azul Pacifico v. City of Los Angeles, supra*, based its analysis on unwarranted assumptions with respect to "market," "monopolies," and "value comparisons" which are not borne out by real world considerations of mobilehome park living. Specifically, it assumed that the artificially depressed prices at which mobilehomes are sold in non-rent-control parks were "market" prices and should be used as a bench mark from which to measure the premiums supposedly resulting from the sale of mobilehomes in rent-control parks. The observed higher price brought by sale of a mobilehome in a rent-control park is primarily a consequence of values taken by park owners from

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[2]The term "premium" is used here, and at times throughout the remainder of this brief, in the sense that it is used in *Hall* and *Azul* as denoting an observed differential between the sales price of mobilehomes in rent-control and non-rent-control parks resulting from rent-control depressed rents. However, EMPAC expressly disavows any implication that by adopting the terminology of *Hall* and *Azul* it concurs with the reasoning of those cases. Observed differences in the sales price of mobilehomes can be the result of a multitude of factors. For example, there is an in-place "locational value" of mobilehomes in parks attributable to transportation, assembly and related costs never evaluated in *Hall* or *Azul*; inflation causes premiums; premiums can result from differences in the financing costs of homes, the condition of homes and landscaping, the quality of the homeowners' association in a park to name just a few factors. Further, all that can be observed is the price *differential*, not its cause. EMPAC asserts that the sales price differential is caused by excessive rents in non-rent-control parks and fully supports the briefs of respondent and other amici which argue the takings analysis of *Hall* and *Azul* is fatally flawed and should be rejected by the Court.

homeowners in non-rent control parks through the exercise of the landlord's quasi-monopolistic power and not from depressed rents in parks subject to rent control. As a consequence of these invalid assumptions, the Ninth Circuit's reasoning is flawed and resulted in the erroneous conclusions reached in *Hall* and *Azul*. This Court should thus reject the analysis of those two cases and instead approve the reasoning of the California Fourth Appellate District in *Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349.

BACKGROUND

To fully appreciate the significance of the issues raised in *Hall* and *Azul*, it is necessary for the Court to be aware of why the voters of Escondido adopted Proposition K.

Escondido has 28 mobilehome parks containing an aggregate of approximately 3,100 mobilehome spaces for rent. In the early 1980's there were virtually no vacancies in these parks. As a consequence, park owners began to raise rents, sometimes to unconscionable levels.[3] If the mobilehome owners complained, the usual answer was - "take it or leave it"; "leaving it" of course meant moving out if a vacancy could be found anywhere within a reasonable distance. However, moving a

[3]On August 31, 1983, Vista Verde Mobilehome Estates was sold. Effective December 1, 1983, the new owner raised park rents by more than 30% over the prior year's rent. In December 1987, Westwinds Mobilehome Lodge was sold. Effective March 1, 1988, the new owner increased rents by more than 30% over the prior year's space rent. Rent increases of between 30 to 40% of existing rents are not uncommon on sale of mobilehome parks in Escondido and on several occasions, rent increases in these ranges have been initiated by existing owners. This information is based upon facts obtained by the undersigned counsel in other litigation involving mobilehome park rent disputes in San Diego County (Escondido) and from EMPAC records.

mobilehome costs approximately $10,000.[4] The residents who were mostly elderly, and mostly living on fixed incomes faced a difficult dilemma. They could either accept excessive rents imposed by their landlords which meant a steadily eroding standard of living or they could try to move their homes if they could afford to do so and find a place in some park. A third alternative, selling their homes, was also possible, but if they chose to sell their mobilehome to a new incoming resident, the park owners invariably imposed an additional rent increase on the buyer. This demand for increased rent on sale was also presented on a "take it or leave it" basis with no bargaining opportunities; therefore homeowners were unable to sell their homes without adjusting the sales price downward to compensate for the park owners' excessive rental demands so that the incoming resident could afford to buy the home and pay the space rent demanded by the park.

The park owner whose resident desired to sell had little or no economic motive to facilitate the transaction. He was obtaining rent at the current level from the existing homeowner and thus, whether a new resident moved in was only of concern to him if the new homeowner could be made to pay higher rent. If the existing resident was elderly and became ill or died, it made no difference. Whether the resident lived in the home was irrelevant; as long as the home was on the space, rent had to be paid and the payment of the rent was guaranteed by the value of the existing resident's home.[5]

[4]The estimate of $10,000 is based on counsel's experience and opinions of MAI appraisers developed in litigation pertaining to other parks in the area.

[5]Petition, Appendix D; see Cal. Civ. Code §798.78.

In short, prior to Proposition K, economic power was concentrated almost exclusively in the hands of the park owners. The homeowners' only way to preserve for themselves some portion of their investment in their homes was to organize and create a more favorable regulatory climate by seeking legislation which imposed restrictions on the otherwise unlimited economic power of their landlords. As a consequence, a rent-control initiative for mobilehome parks was put on the ballot in 1984. It lost. But in response to the rapidly deteriorating conditions for the mobilehome owners, EMPAC was formed.

Conditions in the parks did not improve. The City Council of Escondido urged park owners and park residents to come together and attempt to negotiate solutions. It was, however, futile. The City Council then asked five prominent businessmen to confer and propose solutions. EMPAC/homeowners reluctantly accepted the resulting compromise recommendations although they included highly unfavorable provisions; the park owners, however, rejected the suggested solution. Thus the stage was set for another voter sponsored rent-control initiative. The stakes were high. The park owners sponsored a "counter" initiative and spent $200,000 to promote it and also to attempt to defeat Proposition K. In 1988, they failed in both efforts by a 2-1 margin. Proposition K passed. Perhaps not surprisingly the park owners have since refused to give the ordinance a fair chance to work, apparently preferring to use the legal system to attack and destroy it and thereby regain their former unrestricted power over rents.

The officers and directors of EMPAC are all residents/mobilehome owners in Escondido mobilehome parks. They receive no compensation for their services. Jerry Lenhard, president since November 1987, is a retired machinist who spends more than 70% of his time helping homeowners to deal with the inevitable and difficult problems of mobilehome park living including, but not limited to, rent-control issues.

ARGUMENT

I. Proposition K Permits Increases of Space Rentals on the Sale of a Mobilehome to an Incoming Resident and Is Therefore Distinguishable From the Ordinances in *Hall v. City of Santa Barbara* and *Azul Pacifico v. City of Los Angeles* and Passes Cons' utional Muster.

Proposition K differs significantly from the ordinances examined in *Hall* and *Azul* and thus the taking analysis which is the gravamen of those cases is not applicable to the Escondido ordinance. The ordinances considered in *Hall* and *Azul* contain provisions which allow only limited rent increases. Caps were set both on how often and how much space rent could be increased by a landlord in a given year. In *Hall*, the Santa Barbara ordinance permitted landlords to increase the rent unilaterally only once a year by 3% or by 3/4 of the CPI increase, whichever was greater. A larger increase required arbitration. In addition, whenever a space became vacant, under the Santa Barbara ordinance, the landlord was restricted to a rent increase not to exceed 10%.[6] Thus, the amount and frequency of rent increases was restricted, both on an annual basis and when a vacancy occurred. Moreover, the Santa Barbara ordinance required park owners to give leases of indefinite duration.

In *Azul*, the initial ordinance prohibited landlords from raising space rents when mobilehomes were sold. That provision was repealed and the ordinance amended to allow landlords to raise rents on the occurrence of a vacancy but restricted such rent

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[6]It is not clear whether "vacant" under the Santa Barbara ordinance means removal of a mobilehome from a space or sale of a mobilehome in place; but presumably either alternative would satisfy the requirement (*Hall v. City of Santa Barbara, supra*, 833 F.2d 1270, 1273 fn. 3).

increases to the highest rent charged for a comparable space in the same park or 10%, whichever was less.[7]

In contrast, section 4 of Proposition K permits park owners to seek rent increases without limitation as to frequency or amount. All a park owner need do is to make an application to the rent-control board setting forth the basis for his asserted right to an increase. There are some 11 criteria which the board must consider in passing upon such applications. They include changes in the CPI, capital improvements made by the landlord, increased cost and maintenance, taxes, utility charges to the extent they affect park owners, need for repairs, and the like. However, in addition to the enumerated criteria, Proposition K provides that the board shall consider "... any other factors it considers relevant. . ." in determining whether or not an application for a rent increase should be granted.[8]

Thus, unlike the Santa Barbara and the Los Angeles ordinances, the board under Proposition K is permitted to consider the sales price received by homeowners on the sale of their mobilehomes as a factor affecting its determination of rents on the space on which the home is situated. It is also important to note that under Proposition K there are no limits as to how often and how much of an increase a park owner can obtain; the landlord is not restricted to once a year rent increases or to rent increases based upon the occurrence of designated events; i.e. such as tax increases. In fact, he is free to ask for a rent increase with respect to a single space in his park or indeed on all spaces

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[7]It appears that under the Los Angeles ordinance rent increases were permitted on the sale of a mobilehome (*Azul Pacifico v. City of Los Angeles, supra*, 91 Daily Journal DAR 13599, 13599).

[8]Joint Appendix pp. 7, 11.

in the park on the sale of a single mobilehome to a new homeowner if he deems the facts of that sale relevant to the establishment of new space rental levels. Since all relevant factors must be considered, if a "premium"[9] is paid by a buyer of a mobilehome, it can be used by the landlord to support his application for a rent increase.

Thus, a park owner can present to the rent-control board evidence of the alleged premium at which mobilehomes in his park are selling and/or the premium at which any particular home in his park sold; and he can argue the existence of such a premium is an indication that rents in the park are unfairly low and that a rent increase on that space, or on all spaces, is in order.[10] The unique provisions of Proposition K permit the rent-control board to evaluate on a case by case basis individual sales of mobilehomes within a given park and to make adjustments in the dynamic between homeowner and landlord rights in that park based upon the economic factors of such sales. Obviously, the existence of this adjustment mechanism, which can be activated by a premium paid by the incoming homeowner in connection with the purchase of the existing resident's home, precludes or at least minimizes most of the evils of monetized premiums envisioned by the Ninth Circuit in *Hall* and *Azul*.

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[9]The term "premium" as used here means a premium of the type described in *Hall* and *Azul*; i.e. an enhancement of the mobilehome sales price over its fair market value resulting from depressed space rents. EMPAC does not believe that any such premiums have ever occurred in the sale of Escondido mobilehomes. Also, see footnote 2.

[10]Of course, homeowners will be permitted to dispute the existence of such a premium and/or argue it is attributable to other factors. See footnote 2.

Because rent increases can be awarded where depressed rents result in premiums on sale of mobilehomes, the mere possibility of such increases will logically tend to eliminate the payment of such "premiums." Thus, few if any premiums will be paid for mobilehomes and, since the sales price of mobilehomes will be restricted to fair market levels, nothing of value will be taken from the landlord and given to the existing residents. The landlord will be able to obtain a fair space rent and the homeowner will receive only the fair market value of her home; she will not be able to "monetize" the benefits of unfairly depressed rents and appropriate these values for herself as a part of the sales price of her home. Under Proposition K, there can be no "taking" of the type described in *Hall* and *Azul*.

The secondary consequence of this adjustment mechanism is that under Proposition K the benefits of rent control will be passed on and enjoyed by successor purchasers of mobilehomes. Proposition K does not result in increased occupancy costs to successor residents and thus deny them the benefits of rent control. It enables the rent-control board to "fine tune," on a transaction by transaction basis, the respective rights of the landlord and residents in a given mobilehome park in order to establish and maintain an equilibrium fair to both. The landlord and the homeowners will each be allowed to preserve their equities in their respective property and overreaching by each will be curbed. The *Hall* and *Azul* analysis is simply not applicable to the Escondido rent-control ordinance.

In sum, Proposition K significantly differs from the ordinances considered in both *Hall* and *Azul* where park owners were subjected to limitations in both amount and frequency of rent increases (*Hall v. City of Santa Barbara, supra*, 833 F.2d 1270, 1273, fn 3, and *Azul Pacifico v. City of Los Angeles, supra*, 1991 U.S. App. Lexis 26335, 91 Daily Journal DAR 13599, 13599). The ordinance allows the rent-control board to adjust the equities and balance the park owner's right to a fair rent with

the homeowner's need to be free of rent gouging and to protect the equity in her home.

EMPAC strongly disagrees with the premises of *Hall* and *Azul* and the reasoning and conclusions based thereon and urges this Court to reject the same. However, even if the Court accepts the takings analysis of the Ninth Circuit, the feedback adjustment mechanism built into Proposition K precludes takings of the type described in *Hall* and *Azul*. Certainly on the record before the Court, and in view of the specific language of Proposition K permitting space by space rent increases in mobilehome parks, and by reason of the adjustment mechanism built into the ordinance enabling the rental control board to use mobilehome sales premiums resulting from inadequate rents as a basis for rent adjustment, and petitioners' failure to even attempt to utilize the ordinance's procedures to seek a fair rent increase, it would be inappropriate for the court to find that the enactment of Proposition K amounts to a per se taking.

II. "Takings" and the Economics of Mobilehome Parks.

A. It Is Improper to Use the Sales Prices of Mobilehomes in Non-Rent-Control Parks as the Basis for Computing "Premium" on the Sale of Mobilehomes in Rent-Control Parks.

Hall and *Azul* rely upon resale price guides and empirical studies to establish the existence of a differential between the sales price of mobilehomes in non-rent-control parks and the prices at which similar homes are sold in parks subject to rent control. The opinions simply assume that the sales price of mobilehomes in non-rent-control parks is determined by classical forces of supply and demand operating within a relatively Laissez Faire economic environment and conclude that the observed sales

price differential is a consequence of suppressed rents (i.e. rents below market) in mobilehome parks subject to rent control. The assumption is invalid and the conclusion erroneous.

Unlike the theoretical "free market," where the opposing forces of supply and demand interact to produce a multi-layered spectrum of price equilibria, the prices at which mobilehomes in non-rent-control parks can be sold is determined to a large extent by park owners by the levels at which they establish space rentals. Since space rentals are imposed in non-rent-control parks by the landlord's exercise of quasi-monopolistic power, it is error to use the impaired sales price of mobilehomes resulting from the exercise of this power as the bench mark from which to measure a supposed differential between "free market" sales prices and sales prices of mobilehomes in rent-control parks.

As Judge Kozinski observed in *Azul*, the so-called denizens of mobilehome parks are for the most part lower income strata individuals. Typically, their single most important investment and often their only asset of any substantial value is their home. Rich people by and large do not live in mobilehome parks.[11] In *Azul*, Judge Kozinski hypothesizes that a given individual may have $1,000 per month to spend on housing and that it makes no difference to her whether she pays $800 per month for her mobilehome and $200 per month for rent or vice-versa. The important fact is that the combination of the two expenses not exceed $1,000. The *Yee* court describes the relationship between the rent and the sales price of mobilehomes as "complementary" and it appears that Judge Kozinski agrees

[11]Except in those few ocean front parks where mobilehomes are used as vacation homes; Azul Pacifica is believed to be such a park. The economic analysis described above is not intended to apply to these second home luxury parks.

with this analysis.

However, neither *Hall* nor *Azul* investigate the consequences or find relevant the homeowner's downside of the inverse relationship between space rental levels and mobilehome sales prices. That is, a great deal of judicial effort is devoted to the development of the "premium" analysis resulting from rents artificially maintained at below market levels in rent-control parks and how this adversely affects park owners' property rights, but almost nothing is said about what happens to the sales price of mobilehomes in non-rent-control parks, when space rentals become excessive.

Using Judge Kozinski's own logic, as space rent increases the monthly amount which a purchaser has available for mobilehome payments declines. Thus, the power to raise rents without restriction constitutes the power to destroy the equity of the resident in her mobilehome. Consider the alternatives of a mobilehome owner living in a non-rent-controlled park where the landlord raises rents $100 per month in excess of market.[12] She can: (1) pay the $100 per month rental premium demanded by the landlord; or (2) move her mobilehome out of the park; or (3) sell her mobilehome; or (4) default in the payment of rent.

As Judge Kozinski recognizes in *Hall* and *Azul*, mobilehomes are mobile in name only. It is expensive to move a mobilehome, assuming there is some place to move it to. For

[12]The use of the term "market" here is intended to describe the classical market concept in which the buyer (the incoming resident) is willing to buy a mobilehome but is not required to do so and the seller (the outgoing resident) desires to sell her mobilehome but is not compelled to do so. EMPAC asserts that such a market exists in mobilehome parks only in rare circumstances. See pages 18-20 of this brief. Nevertheless, it seems to be the concept Judge Kozinski uses.

example, there are no vacant spaces in Escondido or vicinity to which a mobilehome may be moved. Moving a mobilehome out of an Escondido mobilehome park generally means relocation to the desert, some 80 miles inland (or farther), a climate not well tolerated by most elderly people. Even assuming a place to move the home exists, it costs approximately $10,000 to disassemble the home, load it on to specially designed trucks, transport it to the new location, and reassemble it.[13] Most people who live in mobilehome parks do not have sufficient cash or credit to enable them to move their homes. Further, all of the amenities installed (or purchased) by the homeowner who is moving (such as porches, sheds, driveways, landscaping, barbecues, etc.) will be lost (forfeited to the landlord or destroyed in the moving process).[14] Finally, if the move is to another "non-rent-control park," the moving homeowner has no assurance that the new park owner will not within a few months/years, etc. do exactly the same thing as the existing landlord (raise rents to a level in excess of market). Therefore, option two is usually not viable.

Option three has already been discussed. When a rent increase occurs, the price at which a mobilehome can be sold declines. Like the opposite ends of the teetertotter, when space rent goes up, sales price inevitably comes down and these two factors operate in tandem in a relationship defined by well-established economic rules. As a consequence, if the landlord raises rent in a mobilehome park to an amount $100 in excess of market, he appropriates from the selling homeowner the capitalized value of the excess rent over the useful life of the

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[13] Again, the estimate of $10,000 is based on counsel's experience and opinions of appraisers in relationship to other parks in the area.

[14] See Cal. Civ. Code §798.55 subd. (a); Petition, Appendix D.

mobilehome resulting in the transfer from the outgoing resident to the landlord of that portion of the equity of the selling resident's home represented by the discounted value of this income stream. The amount of equity lost by the outgoing homeowner depends upon the size of the differential between the rent imposed upon the new resident and market rent. The larger the deviation from market rent, the greater the loss the outgoing homeowner will have to bear. Except in those rare cases where the space rental premium (the differential between the market rent and the amount charged by the landlord) is relatively small, selling is not an acceptable solution to a homeowner subjected to an unfair rent increase.

Obviously, defaulting is not an acceptable alternative either for this results in the outgoing homeowner's loss of the entire equity in her home. This leaves as the only realistic alternative option one, i.e. to pay the excessive rent and this is the choice almost universally made by residents subjected to excessive rent increases by unscrupulous landlords in non-rent-control mobilehome parks.

How often is this scenario played out by the participants in mobilehome living? After all, it is unrealistic to assume that all landlords are rent gougers. Surely there are some who will not take advantage of elderly residents who usually cannot afford to hire lawyers to defend themselves. The answer to the question is -- always; it's just a matter of time. The underlying economics are inevitably determinative. Consider for example a 100 space park where the park owner raises rent $100 per space in excess of market. This translates to a $1200 per year premium per space. For the 100 spaces in the park this constitutes an aggregate rent premium ("bonus value") of $120,000 per year ($1200 x 100 spaces). The capitalized value of this bonus value income stream is more than $1,000,000 (ten times earnings). If the current landlord is too squeamish to raise rents and watch the resultant suffering (elderly residents who cannot afford to heat their homes

or light them; people living on subsistence diets, etc.) his successor will not be. The current owner will simply sell the park (and realize in the process a substantial part of the incipient bonus value) and the new landlord will (again) raise the rent. It is a story endlessly repeated in the mobilehome park world.

As may be seen from the above analysis, there are no mom and pop mobilehome parks -- there are only rent-control and non-rent-control mobilehome parks and the latter living arrangement has created the last of the feudal lords. The landlord of a non-rent-control park holds his homeowners hostage; they cannot escape except at great expense, by paying a moving cost most of them cannot afford and by moving to a climate many of them cannot tolerate. Thus, he makes such park rules as suit his purpose, with no contrary voice ever heard. When he raises the rent, he establishes by that process the amount a resident who desires to sell (and often because of the inevitable result of the process of aging, must sell) can realize for her mobilehome. Thus, by his largess or his desire to punish or most often, as a result of a willingness to engage in rent gouging, the landlord decides whether the selling resident escapes with part of her equity in her home or is pauperized.[15]

The mobilehome park business is not a "mom and pop" type operation. It is big business and generates large amounts of money. A million dollar premium is what you can derive from a typical "mom and pop" mobilehome park by simply raising the

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[15]In many mobilehome parks the end result of the process over time is the landlord's acquisition of the residents' mobilehomes for salvage value costs.

rent $100 a month more than market.[16]

B. The Geographical Market as *Azul* Describes It Does Not Exist.

The court in *Azul* rather cavalierly dismisses the argument of the City of Los Angeles that a monopoly existed in the mobilehome market. The court states it would be impossible to establish a monopoly in the rental market and uses the State of California as a geographical example.

As the foregoing analysis indicates, whether a "free market" in mobilehome sale prices in fact exists is open to question. However, the court's example in *Azul* is in any event inappropriate. The market for mobilehomes which the interested buyer searches out is typically a local market consisting of one mobilehome park or group of mobilehome parks in a geographically limited area. Certainly it is not usual for someone interested in purchasing a mobilehome to search the entire state.

Logic alone tells us that a monopoly situation can exist within one park with no vacancies, or within a community with numerous parks with no vacancies. The fact that mobilehome parks with vacancies may exist in northern California or even in

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[16]Some of the opposing Amici refer to so called "mom and pop" mobilehome parks raising images of the corner grocery store owner just eking out a living. In fact, mobilehome parks have been a preferred investment of real estate syndications for many years. These syndications, many of which are registered tax shelters, are typically absentee owners. They usually include wealthy, passive investors who favor mobilehome park investments for there stability of income; (mobilehome parks, once full, are almost never vacant); recession-proof resilience to downturns in the economy (most mobilehome park residents are pensioners); low maintenance (unlike apartments, the typical park has minimal improvements), and the ability to consistently increase income by raising rentals and thereby enable investors to realize substantial profits over relatively short term holding periods.

Orange County does not relieve Escondido (or southern California) mobilehome park residents or prospective purchasers from the kind of economic pressures described above. In non-rent-control venues, the park owner has the economic power, within his park, to fix rents and the exercise of this power is in no way mitigated or tempered by the traditional forces of supply and demand. EMPAC asserts that the rents established by the exercise of such power are monopolistically determined and the resulting negative effect on the sale prices of mobilehomes within such parks amounts to nothing less than the taking by the landlord of the homeowner's equity in her home. In any event, the economic attributes of such a park are not "free market" derivatives and it is simply erroneous to use depressed mobilehome sale prices resulting from such rents as the basis for the value/price comparison in which the Ninth Circuit engages.

If rents in the typical non-rent-control mobilehome park exceed "market" as a consequence of the exercise of monopolistic power, as EMPAC asserts, then what does this ephemeral concept really mean in the context of mobilehome park economic life? Do market rents in the sense of a classically competitive market ever exist in mobilehome parks? EMPAC asserts they may -- but only in the so-called "fillup" stage of development of certain mobilehome parks.

A new mobilehome park, which is in the process of "fill-up" has the need, like any other business, to compete for customers if there are other mobilehome parks in the area with vacant spaces. It is only in this unusual situation that the mobilehome park owner cannot dictate terms to incoming homeowners. Therefore, competitive market rules do apply, but only to those parks in "fillup" who are faced with competition from vacant spaces in other nearby parks.

However, even in such mobilehome parks, the price at which a mobilehome will sell is not entirely determined by objective market forces. The mobilehome park owner in a park

in the process of fillup is also a competitor of those existing residents who desire to sell their homes. Obviously, both the landlord and the homeowner who wants to sell are looking for buyers. The landlord would prefer the buyer to purchase a new home and to move it into his park as that would fill up one more space. Therefore, he would be inclined to offer the prospective buyer incentives such as setting the rent on a new space at a lower level than the space rent for an incoming homeowner buying a resale home. After all, the existing resident isn't going anywhere -- it's not as if she can afford to move her mobilehome. As long as her home is unsold and sits on the pad, the existing homeowner must pay rent. Therefore, the landlord has little to gain by facilitating the sale of her home and no incentive for keeping the rent on resales low. However, until the park is full, he cannot raise the rents of existing homeowners too high -- because if existing homeowners become too unhappy they might inform incoming residents of the problems within the park and that would be bad for the rental of the remaining spaces. Therefore, the landlord in a park in a fillup situation rents empty spaces for somewhat less than he will charge an incoming resident for space rent on a space presently occupied by a home purchased by that incoming resident. He also moderates his rent increases to existing residents until the park is full. At that point, the only restraining force on rent increases is that the landlord can't raise rents to a level which would make it economically advantageous for a homeowner to incur the $10,000 it costs to move her home, if she can find a place to move it to. Absent a disaster, mobilehome parks once full are never again empty and the landlord has the full security of the resident's home to guarantee that rents will be timely paid. The "free market" as Judge Kozinski envisions it simply does not exist in mobilehome parks.

C. The Efficacy of Rent Control.

The resident/mobilehome owners' only answer to all of this is political. It is only through organizations like EMPAC that they have any chance of redressing the balance. The homeowners are usually not politically sophisticated. They are not retired judges or lawyers or doctors or businessmen. They are typically retired factory workers, or farmers, or policemen, or school teachers, or government clerks. Their working life has not often brought them into the political forum and most of them cannot afford to hire the sophisticated assistance they need to compete with the political clout generated by the landlord's wealth and power. Therefore, with a few notable exceptions, in California homeowners have generally only been successful in passing rent-control laws in small cities like Escondido. Even there, they were not able to induce their local city council to adopt such an ordinance. It was only by recruiting old ladies to sit at tables in shopping malls and solicit signatures to place the rent-control initiative on the ballot that they were finally able to enact rent control.

Proposition K is not a retaliatory measure. It does not attempt to punish mobilehome park owners for past transgressions. It simply limits rental increases to amounts that are fair and reasonable. The ordinance was promulgated in an effort to restore some semblance of fairness and balance to the mobilehome park world by allowing homeowners to preserve a part of the equity in their mobilehomes that would otherwise be taken from them by their landlords' excessive, unrestricted rent increases. The analysis of *Hall* and *Azul* ignores all of the above. It uses the artificially low sale prices of mobilehomes resulting from the landlord's ability to control space rentals in non-rent-control parks as the measure of the landlord's damages.

Hall and *Azul* make public funds available to compensate landlords whose parks have been subjected to rent control for the loss of their former victims. In addition, inexplicitly *Azul* holds

a public entity cannot escape the ravages of its taking analysis. According to *Azul*, if Escondido were to repeal Proposition K tomorrow, the park owners would still have to be compensated for the loss of the rental premium income stream they would have been able to extract from the residents of these parks absent rent control -- because according to *Azul*, the taking occurs not when the mobilehomes are sold, but upon the passage of Proposition K. Therefore, under the *Azul* rule, a park owner is entitled to compensation for the interest allegedly "permanently" taken from him, even if that interest is ultimately restored to him.

Azul and *Hall* are bad law. The rules formulated in these cases are wrong because the underlying facts upon which these rules are predicated do not exist. Obviously, the real agenda of the author of *Azul* and *Hall* is the elimination of rent control. As Justice Weiner most aptly stated in *Yee*, the wisdom of rent control is a matter for the legislature, not the courts to decide (*Yee v. City of Escondido, supra*, 224 Cal.App.3d 1349, 1358).

Proposition K does not work a taking because all it does is return to the residents of mobilehome parks something which belongs to them and was taken from them by the park owners -- the right to realize on sale of their mobilehomes the equity which belongs to them. Even if the Ninth Circuit analysis is accepted and a technical taking has occurred, then the public still should not be required to reimburse mobilehome park owners for the "losses" they sustain in returning to park residents the equity in their homes which they wrongfully appropriated before the enactment of Proposition K.

Finally, while economic analysis can be helpful as a way of producing insights into the consequences of a given course of action, it is not the end-all and be-all of legal decision making. Indeed, it is only one of the many factors which this Court must consider in charting its course in this very difficult area. The human component, the cost in human suffering and displacement must also be evaluated as it impacts upon the final decision. This

component incorporates elements which cannot be quantified in economic terms. National treasure is more than dollars and cents. And consider, for example, the economic value of free speech. Weighed only by an economic scale, we would have lost our first amendment rights long ago. Similarly here, the trauma associated with the physical dislocation and/or loss of the homes of elderly lower income people is a factor which cannot be ignored by society and this Court.

CONCLUSION

By permitting unrestricted applications for rent increases, without limits either in amount or frequency, on sales of individual mobilehomes within a mobilehome park, Proposition K is distinguishable from the ordinances examined in *Hall* and *Azul*. As a direct consequence of this difference, "premiums" attributed to depressed rents cannot develop in parks subject to Proposition K or if they do, rents can be adjusted upward to eliminate the same and the benefits of rent control *will* be passed along to successive tenants.

EMPAC agrees with respondent and adopts its arguments that the taking analysis of *Hall* and *Azul* is unsound and should be rejected by the Court. However, notwithstanding *Hall* and *Azul*, the adjustment mechanisms built into Proposition K compel a different conclusion than those reached there. No taking has or can occur as a consequence of the enactment of Proposition K.

Amicus also urge this Court to recognize that the conclusions reached in *Azul* and *Hall* are based on incorrect assumptions regarding the operative price mechanisms of markets with the characteristics of mobilehome parks. Because of the hostage-like aspects of mobilehome park living, park owners are able to and *do* wield excessive economic power. If mobilehome living is to be preserved as a viable option in the low-cost housing market, the only recourse is to balance the competing interests of landlords and homeowners with equitable ordinances such as

Proposition K. This is an appropriate function of local government and is constitutional. The reasoning of *Azul* and *Hall* carried to its final conclusion will not only bankrupt numerous municipalities throughout California and the United States, it will enable park owners to destroy the economic well being of the residents of mobilehome parks everywhere.

EMPAC respectfully urges the Court to uphold Proposition K.

Dated: December 30, 1991

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE, *et al.*,
Petitioners,

v.

CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

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BRIEF AMICUS CURIAE OF THE CITY OF SAN JOSE AND THE CITIES AND TOWNS OF ALAMEDA, ANAHEIM, AZUSA, BERKELEY, CARPINTERIA, CARSON, CATHEDRAL CITY, CHINO, CHULA VISTA, CLEARLAKE, CLOVERDALE, COACHELLA, COMMERCE, COTATI, DEL REY OAKS, EL CAJON, FAIRFIELD, FREMONT, GLENDALE, GROVER CITY, GUSTINE, HAYWARD, HEALDSBURG, IMPERIAL BEACH, INDIO, LA MESA, LAVERNE, LAFAYETTE, LANCASTER, LIVERMORE, LOMA LINDA, LOMPOC, LOS ANGELES, LOS GATOS,

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INTEREST OF AMICI

Amici are more than eighty (80) cities and counties in the State of California. Included are communities with mobilehome rent control ordinances (some have vacancy control and some do not) as well as communities with no intent to enact mobilehome rent control. Amici are all extremely concerned that the Petitioners seek expansion of the *Loretto* physical taking and the substantive due process doctrines.

Local government exercises its police power to enact regulations to protect the health, safety and welfare of its citizens in an increasingly complex economic milieu. In California, Amici are faced with burgeoning populations, severe shortages of affordable housing, decreasing availability of land and a need to address environmental constraints and quality of life issues in the land use and economic regulation decision making process.

Mobilehome rent control should not, as urged by Petitioners, become the vehicle to expand existing taking and due process doctrines.

SUMMARY OF ARGUMENT

The relationship between the landowner, who has put property to use as a mobilehome park, and the homeowner, who has rented space from the landowner upon which to place a mobilehome, is unique. Local governments have found it necessary to establish special regulations to balance the rights and equities between the landowner and the homeowner. Many of the regulations, including those challenged by Petitioners, are intended to protect the substantial investment by the homeowners in their homes while allowing the landowner a reasonable return on his or her investment. Those seeking to strike down these regulations choose to ignore their legitimate justifications.

State and local governments have broad economic and land use regulatory authority. These regulations often

have the effect of placing burdens on some for the benefit of others to promote the public health, safety and welfare. The authority to control prices, in order to balance inequities in the open market, is included within this broad authority.

The Escondido mobilehome rent control ordinance is a form of price control. While it may affect the value of the regulated property, it neither denies economically viable use nor imposes a new or unwanted use of the property. The vacancy control provision is intended to prevent exploitation of a mobilehome space shortage, taking into consideration the unique relationship between the mobilehome owner and the park owner, substantially advancing a legitimate governmental interest.

Utilizing the traditional takings analysis for economic regulations, it is clear that the provision is non-confiscatory. Neither is it a regulatory or possessory taking. Mobilehome tenancies are not physical invasions. Although existing tenants may be able to "monetize" the appreciated value of their ground leases, the Constitution does not mandate that the fee owners receive this appreciation.

There is a strong public purpose in protecting the substantial investments of existing tenants in their mobilehomes. The Escondido ordinance is carefully tailored to balance the substantial investment of the mobilehome owner with that of the park owner. Protection of the consumer welfare through this type of price control is unquestionably a legitimate purpose of governmental action.

Local governments have broad authority to regulate land use and economic relations. Clearly the due process clause does not forbid adjusting the benefits and burdens of economic life to promote the common good. The mobilehome rent control ordinance is such an economic regulation.

Amici are extremely concerned that the adoption of the reasoning in *Hall v. City of Santa Barbara*, 833 F.2d

1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988), would result in a broadening of the possessory taking and substantive due process analysis which would create an unworkable legal framework for local government. We strongly urge that the *Hall* reasoning be rejected.

ARGUMENT

I. INTRODUCTION

Mobilehomes are a unique form of housing. The owner of the mobilehome itself is ordinarily a tenant who rents space in a mobilehome park. The landlord owns the park and common facilities but has no legal interest in the residential structure. Mobilehome ownership is thus a peculiar hybrid between low cost home ownership and rental housing.

Modern land use policies, combined with the ever diminishing availability of land, have created an almost monopolistic resource for park owners with regard to the availability of mobilehome space.

Despite its name, the mobilehome is anything but "mobile".[1] Not only are there a limited number of mobilehome parks with limited available space but it is often not physically possible to successfully relocate a mobilehome. In the absence of vacancy control, even in a park otherwise subject to rent control, the park owner can impose an excessive rent whenever there is an in-place transfer of a mobilehome. Because there generally is no practical way to move the mobilehome to an alternative park, when rent increases for in-place transfers are unlimited, the mobilehome owner is forced to stay in the mobilehome or to sell it at a substantially reduced value. At the extreme, an uncontrolled rent can literally make

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[1] Hirsh and Hirsh *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA Law Review 399, 403 (1988).

it impossible to give the mobilehome away. Therefore, the mobilehome owner, much more than the apartment tenant, is at the mercy of the landlord who, because of the lack of alternatives available to the tenant, can raise rents excessively.[2] Local governments have sought to balance this relationship by imposing that type of mobilehome rent control known as "vacancy control." [3]

Mobilehomes are traditionally a relatively affordable type of housing. Mobilehome owners are often senior citizens or young families with limited incomes who have invested the bulk of their savings in their mobilehome.[4]

---

[2] Petitioners blithely dismiss these concerns. (Petitioners' Brief at 29.) However, the City of San Jose repealed its vacancy control provision in 1989 in response to the *Hall* decision. At a public hearing on September 10, 1991, the San Jose City Council heard lengthy testimony describing exactly the kind of increases which Appellant characterized as "illusory." For example, mobilehome owners testified that as a result of proposed rent increases as high as 60% at the time of sale, prospective purchasers were unwilling to purchase mobilehomes offered for sale.

The Petitioners' Brief at 29 n.13 mischaracterizes the City of San Jose ordinance which in response to the dramatic testimony reimposed vacancy control very similar to the Escondido Ordinance but suspended it pending a favorable determination by this Court. Because the San Jose ordinance has been cited by Petitioners and their Amicus, The Manufactured Housing Educational Trust of Santa Clara County, we have lodged a copy of the ordinance with the Clerk of the Court.

[3] Vacancy control refers to a limitation on rent increases upon in-place transfers of the ownership of a mobilehome, i.e. when the mobilehome owner sells the mobilehome and the new owner becomes the tenant of the mobilehome park.

[4] The October 19, 1990 report by the California Department of Housing and Community Development listed 30 mobilehome parks and 3700 mobilehome spaces in Escondido. The March 27, 1990 County of San Diego "County Wide Mobilehome Task Force Final Report" found that 80% of the mobilehome spaces in the County were occupied by "senior households" who are "generally small elderly families with fixed incomes." *Id.* at 5.

They are, therefore, quite vulnerable to the impact of excessive profiteering by park owners. Vacancy control is appropriate and necessary to balance the relationship between park owner and homeowner for the protection of these consumers.

II. MOBILEHOME RENT CONTROL IS A VALID SPECIES OF ECONOMIC OR LAND USE REGULATION.

A. Local Government Has Broad Economic and Land Use Regulatory Authority.

State and local governments have broad authority to adopt regulations, which have the effect of placing burdens on some for the benefit of others, to promote public welfare. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

Price controls which limit the profits of producers or vendors for the benefit of consumers are permissible police power regulations. For example, in *Munn v. Illinois*, 94 U.S. 113 (1877), the Supreme Court upheld the constitutionality of state provisions which allowed the legislature to fix the maximum rate to be charged for the storage of grain in warehouses. Similarly, in *Nebbia v. New York*, 291 U.S. 502 (1934), the Supreme Court upheld a state statute which permitted a Milk Control Board to fix the minimum and maximum retail charges to consumers. In striking down a challenge to this regulation, the Supreme Court stated: "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Id.* at 539.

The mere fact that value is shifted from one segment of the community to another by government regulation does not make the regulation unconstitutional. All price

control regulation limits the profits of the provider by reducing the amount which the consumer would otherwise have to pay to the provider. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

Price controls may be enacted in order to prevent "speculative, unwarranted and abnormal" price increases and "to protect persons with relatively fixed and limited incomes . . . from undue impairment of their standard of living." *Yakus v. United States*, 321 U.S. 414, 420 (1943).

Land use controls similarly have the effect of limiting the profit of the landowner. Often the imposition of a land use control on one piece of property will concurrently increase the value of nearby property. The mere fact that a property owner's potential profit is severely diminished by regulations that serve to benefit others does not result in a constitutional violation. In the seminal case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), a zoning law, adopted for the public benefit, which resulted in a 75% reduction in value of private property was upheld.

In *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), a landmark preservation law was upheld although it resulted in a land owner being denied the ability to build a proposed fifty story addition to the existing structure, severely limiting its development potential, to the benefit of neighboring property owners as well as the City.

In *Agins v. Tiburon*, 447 U.S. 255 (1980), the Court upheld a zoning ordinance which restricted development of the privately owned property to construction of between one and five single-family residences on a five-acre tract resulting in a severe limitation of the development potential and a reduction in property value.

It is axiomatic that virtually all zoning laws benefit certain properties to the detriment of others. These land

use regulations find their validity in the intended overall benefit to the residents and property owners of a jurisdiction.

B. Local Governmental Entities Have Broad Power to Regulate the Landlord-Tenant Relationship.

The Supreme Court has consistently held that local public entities have broad power to regulate the landlord-tenant relationship. In *Pennell v. The City of San Jose*, 485 U.S. 1 (1988), this Court upheld, from a facial challenge, a provision in the City of San Jose's Rent Control Ordinance which allowed a hearing officer to consider, among other factors, the hardship to the particular tenant when determining whether to approve a landlord's proposed rent increase in excess of eight percent (8%). This Court reiterated: "We have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.'" *Id.* at 12 n.6. The fact that the landlord can receive less when the tenant can afford less did not make the ordinance facially unconstitutional.

In *FCC v. Florida Power Corporation*, 480 U.S. 245 (1987), this Court upheld the fixing of a rental rate that could be charged to cable companies by utilities for use of the utility's power poles by the cable companies. The price fixed by the Federal Communications Commission resulted in a substantial reduction of income to the utility company as compared with the rate previously agreed upon between the utility and the cable companies, thereby creating a "windfall" for the cable companies. Even with this substantial economic shift, the Court found no taking.

C. Mobilehome Rent Control With Vacancy Control Is Based on a Proper Public Purpose.

1. *The Escondido Ordinance Prevents Exploitation of a Mobilehome Space Shortage.*

This Court has long acknowledged the general purposes served by rent control regulation. "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present." *Block v. Hirsh*, 256 U.S. 135, 156 (1921). "Indeed, a primary purpose of rent control is protection of tenants." *Pennell*, 485 U.S. at 13.

The purpose of a vacancy control mobilehome rent control ordinance is to balance the homeowner/parkowner relationship by protecting the mobilehome owners' substantial investment from excessive and unreasonable space rent increases which could prevent them from selling their homes, or force them to abandon their mobilehomes, or at minimum, substantially reduce the value of the mobilehomes. The rent control ordinance is important to prevent park owners from taking unconscionable advantage of the mobilehome space shortage in California.

2. *The Unique Relationship Between a Mobilehome Owner and A Park Owner Makes Vacancy Control an Important Element of Mobilehome Rent Control.*

Mobilehome owners, unlike typical apartment tenants or residents of other rental housing, are in the unique position of having made a very substantial investment in a residence for which space is rented or leased.[5] Removal or relocation of a mobilehome from a park space is generally not a practical alternative to an in-place transfer.

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[5] Manheim, *Tenant Eviction and the Taking Clause*, 1989 Wis.L. Rev. 925, 956 n.179, notes that modern mobilehomes often cost between $30,000 and $75,000.

Often the older mobilehomes do not meet the standards required to move into other parks today. Even if an alternative site is available, the move can only be accomplished at substantial cost and often may cause extensive damage to the mobilehome. It also may result in a loss of integrated landscaping and supporting structures. This unique situation was articulated best by the State of California legislature when it adopted eviction protection for mobilehome owners in Civil Code § 798.55, which reads in part as follows:

> The legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.
>
> California Civil Code § 798.55 (Deering 1983)

The Escondido mobilehome rent control ordinance with its vacancy control provision is intended to protect the significant investment by mobilehome owners in their mobilehomes while at the same time providing to park owners a fair and reasonable return on their investment.

The legitimacy of this purpose was *even* acknowledged by the Ninth Circuit Court of Appeals in the recent case of *Azul Pacifico v. City of Los Angeles*, 91 C.D.O.S. 8840, —— F.2d —— (9th Cir. 1991). The court stated in this regard:

> [T]he ordinance does protect *existing* tenants from being forced to sell their coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach. . . . The correctness of the city's decision to insure coach owners against unscrupulous land-

> lords in this way is a legislative question, not a judicial one.

Id. at 8842.

III. THE MOBILEHOME RENT PROTECTION ORDINANCE IS NOT AN UNCONSTITUTIONAL TAKING

A. Economic Regulation Is Permissible as Long as It Is Not Confiscatory; the Mobilehome Rent Protection Ordinance Is Not Confiscatory.

In *FCC v. Florida Power Corp.*, 480 U.S. at 253, this Court reiterated that price control regulation may stringently limit the return on investment, but "[s]o long as the rates or rents are not confiscatory, the Fifth Amendment does not bar their imposition."

The relationship of the taking clause to economic regulation was clearly expressed in *Connolly v. Pension Benefit Guarantee Corporation*, 475 U.S. 211 (1986).

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

Id. at 223.

The mobilehome rent control ordinance with vacancy control adjusts the benefits and burdens of economic life to substantially advance a variety of legitimate government interests, including concern about the ability of mobilehome owners, many of whom live on fixed and limited incomes, to transfer their homes, as well as the protection of the substantial investments by these mobilehome owners. Park owners who take advantage of the

mobilehome space shortage and the unique relationship between mobilehome owners and park owners to charge unreasonable and excessive rents directly create the problem which cities and counties are attempting to solve. Limiting this excessiveness, even if it results in a significant benefit to the mobilehome owners, is not unfair nor unjust.

B. Under a Land Use Regulation Takings Analysis, the Mobilehome Rent Protection Ordinance Is Not a Taking.

The mobilehome rent control ordinance challenged in this action regulates the economic relationship between the park owner landlord and the mobilehome owner tenant. The validity of the ordinance as an economic regulation has been shown. To the extent that the rent control law also operates to regulate the property relationship between the landlord and the tenants it is also a valid regulation of land use.

Land use regulations is found not to effect a taking if it substantially advances a legitimate state interest and does not deny an owner the economically viable use of his or her land. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The Court in *Nollan* held that there must be a sufficient nexus between the challenged provision and a legitimate state interest. *Id.* at 837. The mobilehome rent control ordinance with the vacancy control provision, directly and substantially furthers the legitimate government interest in preventing park owners from exploiting a mobilehome space shortage and the unique relationship between mobilehome owners and park owners at the expense of the mobilehome owners. (*See Azul Pacifico*, 91 C.D.O.S. at 8842).

Furthermore, there is no question that the challenged regulation does not deprive the landloard of an economically viable use of his or her land nor unreasonably impair its value so as to interfere with investment backed

expectations. *Agins v. Tiburon*, 447 U.S. at 260; *Penn Central*, 438 U.S. at 130-131 n.27. The park owner continues to fully utilize the property for its intended purpose and is not foreclosed from collecting or even, under certain circumstances, raising rents. The ordinance provides the landlord with a fair return on his or her property. (Joint Appendix at 24-28). As noted by the California appellate court: "Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a 'fair' rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no 'taking'." *Yee v. City of Escondido*, 224 Cal.App.3d 1349, 1354 (1990).

Clearly, there has been no taking under the regulatory takings analysis.

IV. OCCUPANCY OF RENTAL PROPERTY AT REGULATED RENTS WITH VACANCY CONTROL DOES NOT CONSTITUTE A POSSESSORY TAKING.

The essence of Petitioners' argument is that the Escondido Ordinance deprives mobilehome park owners of a valuable property interest and transfers it to tenants. They claim the transfer is a result of a permanent physical occupation of land and is subject to the more rigorous analysis of "possessory takings" pursuant to the holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This theory was adopted by the court in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988). The *Hall* court, based on an expansive interpretation of *Loretto*, held that a Santa Barbara ordinance had "transferred a possessory interest in . . . land to each of . . . [the] tenants." *Id.* at 1276. "[T]his interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent." [6] *Id.* at 1276.

[6] In *Pennell*, this Court specifically declined to address the contention that the anti-eviction provisions of the San Jose law combined with lower rents for hardship tenants amounts to a physical taking. 425 U.S. at 11.

However, the holding of *Loretto* is "very narrow" [7] and is totally inapplicable to the mobilehome rent ordinances adopted by the cities of Santa Barbara and Escondido.

A. Rent and Eviction Controls Do Not Result in Permanent Physical Occoupation of Land by a Third Party.

1. *A Taking by Physical Occupation Requires Both Uninvited Use and Uninvited User.*

A physical taking requires a governmentally authorized occupation by an uninvited user. This requirement was described in *FCC v. Florida Power Corp.*, 480 U.S. at 252-253 as "the unambiguous distinction between a . . . lessee and an interloper with a government license." [8] Not only was the occupying cable company in *Loretto* an uninvited user or "stranger", 458 U.S. at 436, so too was the use made of the property by the cable company a new, unintended, and uninvited use. *FCC* v. *Florida Power Corp.*, *Id.*, illustrates just how critical this element is. Because the Act challenged in that case did not "require a power company to dedicate a portion of its pole plant to communications use," *Id.* at 251 n. 6, *Loretto* was held to be inapplicable. "[I]t is the invitation, not the rent, that makes the difference." *Id.* at 252.

Eviction limitations which merely extend tenants' right of occupancy do not transform a rent control ordinance into a "possessory taking". This Court has long acknowledged that eviction protection is a necessay incident of

[7] 458 U.S. at 441.

[8] *See also* Patterson, *Property Rights In The Balance—The Burger Court And Constitutional Property*, 43 Md. L. Rev. 518, 539 n.22 (1984) ("the scope of the constitutional property interest does not encompass protection against intrusion by invitees").

rent control. *Block v. Hirsh*, 256 U.S. at 157-158 (1921).[9] *See also Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984); *Taylor v. Brown*, 137 F.2d 654 (Emer.Ct.App.), *cert. denied*, 320 U.S. 787 (1943) (cited with approval in *Parker v. Fleming*, 329 U.S. 531 (1947)); *Flynn v. Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981); *Jambes v. Veale*, 132 Misc. 2d 481, 504 N.Y.S.2d 982 (1986). It is clearly not a taking to authorize a tenant to remain on the property at reduced rents essentially indefinitely. Consequently, it is difficult to imagine how it becomes a taking because rent control continues when the tenant leaves.[10]

Once the park owner has voluntarily chosen to rent the mobilehome space, a taking does not occur merely because the tenant in possession can transfer that tenancy to another. While the particular user might not have been selected by the landlord, the use surely was.[11] By renting to tenants initially, the landlord has voluntarily yielded certain rights associated with possession. Occupation of rented property by tenants is the core of the landlord's "investment-backed expectation." The statutory extension

[9] The Court in *Loretto* specifically approved *Block v. Hirsh* and *Edgar A. Levy Leasing v. Siegel*, 258 U.S. 242 (1922), reading those cases as not involving government action which "authoriz[ed] the permanent occupation of the landlord's property by a third party." 458 U.S. at 440.

[10] The court in *Hall* attempted to distinguish ordinary rent control because that required a tenant to make "difficult choices: if he wants the benefits of the rent control ordinance, he must stay put. If he wants to leave, he must give up a good thing." 833 F.2d at 1279. It is not clear how this distinction can transmute an otherwise valid economic regulation into a taking.

[11] *See Tirolerland v. Lake Placid 1980 Olympic Games*, 592 F. Supp. 304, 314 n.7 (N.D.N.Y. 1984) rejecting taking challenge to ordinance limiting room rates and tenant eligibility, "the Court has serious doubts whether an interference with the right to select one's tenants can amount to an unconstitutional taking".

of an existing intended use is not tantamount to possession.[12]

The important consideration in the analysis is whether the physical occupation is equivalent to an involuntary ouster—dispossessing the owner of essentially all rights in the occupied property. In *Loretto*, the cable company had the right to come onto the property in the first instance, to choose the location of the cable, to expand use to additional parts of the building, and to assign its rights to a successor company, all without the consent of, or payment to, the landlord. Above all, the cable represented a new use, not one that the landlord had voluntarily assumed. 458 U.S. at 423-424. However, where the owner has selected the use and still derives fair and reasonable return on that use, no taking by physical occupation has occurred.

2. *Even With Vacancy Control, Petitioners Retain the Intended Use With an Invited User.*

Petitioners have voluntarily chosen to operate mobilehome parks. The very essence of operating a mobilehome park is space rental to mobilehome owners. With or without vacancy control, as long as the park owner continues to choose to maintain his or her property as a mobilehome park, rented park spaces will be occupied by tenants-in-possession paying rent to the park owner. The

[12] In *FCC v. Florida Power Corp.*, the Court suggested that this was an open question. "We do not decide today what the application of *Loretto* . . . would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *Id.* at 251-252 n.6. However, this referred to the property owner's right to change use, not merely to continue it with a different occupant. Statutory lease extension has no affect on the landlord's use of the property, nor does it deprive the owner of "control over the timing, extent, or nature of the invasion." *Loretto*, 458 U.S. at 436. The Escondido Ordinance does not restrict the use of the property. Indeed, the California Mobilehome Rent Law specifically authorizes termination of tenancies pursuant to a change in use. *See* California Civil Code § 798.56.

physical occupation by the tenant is a result of the park owner's decision to utilize his or her property as a mobilehome park.

The only distinction between a park with vacancy control and one without vacancy control is that under the former the park owner is unable to maximize rents by charging excessive rents at the time of the sale of a mobilehome. Nonetheless, the use of the property remains as intended by the park owner and the park owner will continue to obtain fair and reasonable rent for the leased space. Clearly, no taking by "physical occupation" has occurred.

B. There Is No Possessory Interest Taken from the Park Owner.

Petitioners' *Hall* theory relies heavily upon the contention that a departing mobilehome owner can sell the right to permanently occupy the landlord's property at reduced rents, and keep the proceeds of that sale. The court in *Hall* distinguished the Santa Barbara type ordinance from typical rent control on the theory that it enabled an outgoing tenant to "liquidate" the rent savings "and take [it] with him when he leaves the property." 833 F.2d at 1279.

This *Hall* analysis incorrectly focuses on what the mobilehome owner has gained rather than on what, if anything, the parkowner has lost. The parkowner is in absolutely no different economic position when the mobilehome owner sells the mobilehome with vacancy control than when the mobilehome owner continues to occupy the space (with or without vacancy control).

If a price control is, itself, constitutional, the fact that a consumer realizes a monetary benefit after his or her use of the commodity ends does not compel a different conclusion. Otherwise, any mechanism which controlled wholesale but not retail prices would be unconstitutional

because the retailer can pocket the "monetized" value of the wholesale price reduction when reselling the item at an unregulated price.[13]

1. *Vacancy Controls Do Not Extinguish Reversionary Rights.*

The fact of governmental restrictions on owners' ability to select incoming tenants is unremarkable in the heavily regulated rental housing business. For instance, anti-discrimination statutes severely circumscribe landlords' ability to reject tenants for non-business reasons.[14] Park owners have placed their product on the market and consequently have voluntarily subjected themselves to restriction of the right to reject users of their property.

The fact that the state or an outgoing tenant has a say in the identity of the next tenant does not take a property interest from the landlord, nor does it constitute an invasion of land. A mobilehome owner's bare right to sell his or her coach on site abrogates little, if any, possessory rights the park owner has in the property. It constitutes neither permanent nor indefinite occupation because the park owner's reversionary rights remain virtually identical and intact. The park owner retains the right to convert an individual coach to personal use, to change its use within the park (subject to generally ap-

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[13] Many of the price control schemes upheld against due process and takings challenge appear to have had this feature and effect. *See, e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (fixing maximum on wholesale price of natural gas); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) (upholding a New York law imposing maximum wholesale prices while decontrolling retail prices).

[14] This Court in *Loretto* cited with approval *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding statutes prohibiting discrimination in public places) as a permissable regulation of the landlord-tenant relationship. 458 U.S. at 440. *See also Betsey v. Turtle Creek Associates*, 736 F.2d 983, 988-989 (1984).

plicable use restrictions), or to terminate the mobilehome park use entirely.[15] Restrictions on the ability to choose prospective mobilehome purchasers does not implicate important property rights where possession by others is the very essence of the use made by the owner.

2. *The Tenant's Ability to Reap Economic Benefit Does Not Convert Legitimate Economic Regulation Into a Takirg.*

The basic question which must be decided in this case is the viability of the *Hall* doctrine. California appellate courts, including in the case at bar, have found *Hall's* reasoning unpersuasive and have declined to follow it. The court in *Casella v. City of Morgan Hill*, 230 Cal.App.3d 43, 54 (1991) expressly rejected *Hall's* "espousal of the notion that economic regulation such as the rent control measure challenged here could metamorphosize into the type of physical occupation in *Loretto*."

Careful review of the reasoning in *Hall*, lead the *Casella* court to conclude,

> It is apparent to us that the Ninth Circuit's analysis in *Hall*—that the effect occasioned by the combination of the state regulations and the local ordinance was a "physical invasion"—was no more than a convenient means, as Professor Michelman suggested, of distinguishing a loss the court considered "clearly compensable" from one which it did not. (*Michelman, supra*, 80 Harv.L.Rev. at p. 1228). To indulge in this shorthand, however, does not explain why compensation must be paid for this regulation, as opposed

[15] *Loretto* rejected the defense that invasion by the cable was acceptable because the landlord retained the right to withdraw the building from rental service. 458 U.S. 434 n.17. The situation here is clearly distinguishable because the occupancy by the tenant is the precise use intended by the park owner and the park owner is receiving fair and reasonable rents for that occupancy. There is no unintended invasion by a third party.

> to other regulations which effect a redistribution of wealth for the general social good.

Id. at 51.

Hall transposes the court's own response to the political question about the effectiveness of rent control into its takings analysis. *See Hall*, 833 F.2d at 1281 n.26. As aptly stated by the court below in this case, "the decision whether to use rent control as a tool to correct imperfections in the market system is a political issue for legislative bodies and not a question for the courts." *Yee v. City of Escondido*, 224 Cal.App.3d 1349, 1358 (1990). Courts should not stretch a "very narrow" holding like *Loretto*, 458 U.S. at 441, "beyond the scope to which it legitimately applied." *FCC v. Florida Power Corp.*, 480 U.S. at 251.

V. THE INTEREST WHICH PETITIONERS CLAIM WAS TAKEN AND TRANSFERRED TO TENANTS IS NOT COMPENSABLE.

A. Appreciated Site Value Does Not Constitute Fifth Amendment Property.

The *Hall* theory makes much of the mobilehome owners' ability to capitalize future rent savings. Such savings, Petitioners contend, reflect the difference between market and controlled rents. Rent control in Escondido, as elsewhere, typically does not actually set rents, but imposes ceilings on rent increases. Thus, at the inception of the controls, site value is presumably incorporated into market rent and captured by the park owner. As market rents escalate, if permitted rent increases fail to keep pace, "rent savings" are created. Petitioners claim the Escondido ordinance capitalizes the savings over the anticipated life of the use generating a "windfall" for the departing mobilehome owner. Even if this were true, the question is whether the state may lawfully repose the appreciated value in the mobilehome owner, or whether it

is naturally and constitutionally the property of the park owner.

Property rights, as a general rule, are neither created nor defined by the Constitution. "[T]hey are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). Of course, once having created a property interest, the state is not at liberty to expunge it in derogation of reasonable investment backed expectations. But, unless preexisting state law guarantees property owners a right to profit from future appreciation, that anticipated gain does not constitute Fifth Amendment property. Reposing the gain elsewhere, as would occur for instance with substantial capital gains taxes or resale price controls, does not take from the property owner anything he or she already had.

1. *Appreciation Is the Result of Governmental Land Use Decisions; Appreciated Value Is Created by the State.*

The gravamen of the park owners' complaint is that the Escondido ordinance prevents them from obtaining compensation for the full appreciation of the sites in their parks, as measured by increased rents. That very appreciation, however, results from the scarcity of mobilehome sites.

This scarcity is the consequence of local land use regulations which have limited the number of mobilehome spaces within any given geographic area.[16] While some communities have employed practices which intentionally

[16] See, for example, in *Cider Barrell Mobile Home Court v. Eader*, 187 Md. 571, 574 (1980), where the Maryland Court of Appeals noted: "Despite the rising popularity of relatively low cost mobile homes, many communities have enacted zoning regulations which exclude them entirely or severely limit the areas where they may be placed, frequently restricting them to mobile home parks."

place mobilehomes under a "virtual quarantine",[17] in others the limited number of parks is the unintended result of other zoning practices.[18] The resultant space shortage coupled with the relative immobility of the mobilehome creates an almost monopolistic control in the hands of the park owner.[19]

To say that this appreciation, which has been created by government action, is a property right that may not be taken without compensation, is to make government the absolute guarantor of anticipated gains. This is not the law. *Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("[P]erhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."); *Penn Central Transportation Co. v. New York City*, 438 U.S. at 130 (holding "untenable" the proposition that landowners "may establish 'a taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development. . ."); *United States Ex Rel. T.V.A. v. Powelson*, 319 U.S. 266, 282 (1943) ("In absence of a statutory mandate (citation omitted), the sovereign must pay only for what it takes, not for opportunities which the owner may lose.")

[17] Note Moukawsher, *Mobile Home Parks and Connecticut's Regulatory Scheme: A Takings Analysis*, 17 Conn.L.Rev. 811, 812 (1985).

[18] In California this space shortage continues to exist despite efforts to make sites for mobilehomes available such as laws which make mobilehomes and mobilehome parks permitted residential land uses, California Government Code §§ 65852.3 and 65852.7, and which restrict application of rent control within newly constructed mobilehome parks, Civil Code § 798.45.

[19] The district court in *Azul Pacifico v. City of Los Angeles*, 740 F. Supp. 772, 781 (C.D. Cal. 1990), *aff'd in part and rev'd in part*, 91 C.D.O.S. 8840, —— F.2d —— (9th Cir. 1991), put it this way: "The mobile home market is an example of a monopoly, which is a market *failure*, rather than a market, and is a prime candidate for government regulation . . . ."

2. *Government May Repose in Mobilehome Park Tenants Part Or All of the Appreciated Value That the Government Creates.*

As this Court has pointed out: "In other contexts we have recognized that the government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly . . . ." *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988). Here, local land use policies have created conditions that enable the park owners, absent rent control, to capture the attendant monopoly profits. There can be no question that the government can intervene to ameliorate this situation.

As succinctly stated by the Connecticut Supreme Court, with regard to an in-place sales requirement with essentially a vacancy control regulation unaccompanied by rent control, in *Eamiello v. Liberty Mobile Home Sales*, 208 Conn. 620, 546 A.2d 805 (1988), *app. dism.*, 489 U.S. 1002 (1989):

> Because of the scarcity of mobile home sites, resulting largely from zoning ordinances that bar the establishment of new mobile home developments, the legislature could reasonably have concluded that a substantial portion of the price paid for a mobile home purchased on-site is attributable to the continuing right to lease the site that accompanies the sale. If the mobilehome park operator could require the site to be vacated, he, rather than the tenant, would be in the position to demand for a mobile home that he had placed on the site a price greater than the home itself would bring because of the right to continued occupancy that is incident to the sale. In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle. In our view, [the statute] strikes a reasonably fair balance between the

> economic interest of mobile home tenants and those of mobile home park operators.

Id. at p. 820.

Vacancy control, as in all rent control, has the effect of preventing the landlord from realizing the full value of appreciated land through unlimited rent increases. Monopoly profits are thus decreased. This is clearly constitutional.

B. This Court Has Rejected That Property Interests Can Be Fractionated So as to Establish a Taking.

In assessing a particular regulatory scheme, it is well-established that:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and *extent of the interference with rights in the parcel as a whole* . . . .

Penn Central Transportation Company v. New York City, 438 U.S. at 130-31 (emphasis added).

For example, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497-98 (1987) the Court refused to treat the 27 million tons of coal that plaintiff was required to keep in place as a distinct segment of property in reviewing plaintiff's claim. Instead, the Court held that the value of the coal that was required to be left in the ground had to be compared to the value of petitioner's entire mining operations. *Id* at 498-500.

The approach taken in *Hall*, represents an abrupt departure from this well-established principle. In *Hall*, the property right allegedly taken by Santa Barbara's rent control ordinance was the right to future appreciation in the mobilehome park as reflected in the market rents

that could have been charged at the park. 833 F.2d at 1276. *Accord Azul Pacifico, Inc. v. City of Los Angeles*, 91 C.D.O.S. at 8841. There was no suggestion in the *Hall* case that the rent control ordinance rendered the mobilehome park owner's property economically unviable, prevented an owner from receiving a constitutionally required fair return, or even reduced the property value of the park as a whole. Moreover, under this regulatory scheme, mobilehome park owners retain the right to go out of business, to evict with cause, and to enter onto the premises to inspect or to make repairs. In finding a taking, the *Hall* court focused exclusively on the discrete property interest regulated by Santa Barbara's law and then determined that that particular interest had been permanently taken. Such an approach to assessing a taking challenge has no place in current jurisprudence. Had the court in *Hall* analyzed the Santa Barbara regulation pursuant to the established takings analysis, there is no question that the Santa Barbara ordinance would have withstood challenge.

The ramifications of fractionalizing property interests when undertaking a takings analysis are well-recognized. If a discrete segment of an individual's property can be viewed in isolation from the property as a whole, then any regulation which extinguishes or severely restricts that discrete segment will be found to be a taking requiring compensation. Indeed in *Keystone*, this Court addressed the far-reaching consequences that could result if fractionalization was an accepted approach in takings analysis:

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioner's theory one could always argue that a setback ordinance requiring that no structure be

> built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. (citation omitted).

Keystone Coal Association v. DeBenedictis, *id.* at 498.

The only recent case in which this Court found a regulatory taking solely based on a law's impact on a discrete property interest not involving a physical invasion of property is *Hodel v. Irving*, 481 U.S. 704 (1987). In *Hodel*, this Court found Section 207 of the Indian Land Consolidation Act to unconstitutionally prohibit the owner of an excessively fractionated undivided share interest in allotted tribal land to pass on their property at time of death. 481 U.S. at 716-17. Critical to the Court's determination that this law effected a taking however was the fact that the right to pass on property "has been part of the Anglo-American legal system since feudal times" (citation omitted) and the total abrogation of this right was unprecedented. *Id.* at 716.

VI. A BROADENING OF THE POSSESSORY TAKING ANALYSIS BEYOND THE "BRIGHT LINE" OF ACTUAL PHYSICAL OCCUPATION WOULD CREATE AN UNWORKABLE LEGAL FRAMEWORK FOR LOCAL GOVERNMENT.

If *Hall*'s reasoning is accepted by this Court, all rent control would be subject to a taking claim. Rent control which limits the landlord's ability to evict, even wtih vacancy decontrol, precludes the landlord from maximizing rental income. The tenant has a right to remain in the unit and pocket the benefit of the less than free market value rent. If this Court adopts the reasoning of *Hall*, will it not have, in effect, overruled *Block* as well as *Pennell* and declared all such rent control to be facially invalid?

The theory of *Hall* could be applied in virtually every land use case. *Nollan* provided local government with the

standard against which to test proposed land use regulations and conditions. Local government today looks to ensure that there is adequate remaining economic utility in light of reasonable investment backed expectations and that there is a substantial nexus between the limitations and the governmental interest being promoted by the limitation. Having made this analysis, the City Council or Board of Supervisors can act with reasonable assurance that their action will not later be found to have resulted in an unconstitutional taking. If the reasoning of *Hall* were to be adopted by this Court, it would leave local government unable to determine when it was sufficient to assess a future regulation under *Nollan* and when *Hall* applied.

Almost every land use regulation arguably takes some property interest or a "straw" in the bundle of property rights". Land use development ordinarily entails a variety of conditions and dedications which limit a property owner's use of the land and which serve to benefit other individuals as well as the public at large. For example, height limitations imposed for aesthetic purposes, or as a result of air traffic patterns, or for shadow limitation reasons, even when permissible under a *Nollan* analysis, permanently deprive the property owner of certain air rights for the benefit of others.

Density limitations and open space requirements on development permissible under *Nollan*, may well decrease the property value of the subject parcel while increasing the value of neighboring parcels. Are these requirements then subject to the "monetization" analysis of *Hall*?

Traditional dedication of access easements, flood easements and sidewalk dedication all give third parties permanent rights which intrude on the developers land. All of these requirements increase the property value of neighboring land. All are and should be analyzed under *Nollan*, not *Hall*.

VII. THE ESCONDIDO ORDINANCE IS CAREFULLY TAILORED TO BALANCE THE MOBILEHOME OWNER'S INVESTMENT AGAINST THAT OF THE PARK OWNER AND AS SUCH DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

For nearly sixty years this Court has shown great deference to legislative judgments as to whether a particular enactment advances legitimate state interest—or as the standard is often restated, whether the challenged legislation has a rational basis.[20] The Court has not concerned itself with whether a challenged regulation relating to land use or any economic issue is the best way, or even a good way to deal with a perceived social problem. *See e.g. Schad v. Mt Ephraim*, 452 U.S. 61, 68 (1981) (land use laws are valid if "rationally related to legisimate state concerns"); *see also Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (legislature "was free to decide for itself" what legislation was needed to advance the public interest); *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) ("[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of a law."); *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941) ("We are not concerned . . . with the wisdom, need or appropriateness of the legislation."); *United States v. Carolene Products*, 304 U.S. 144, 152 (1937) ("[T]he existence of facts supporting the legislative judgment is to be presumed.")

With respect to rent control, this Court has "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for

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[20] Whether the legislation is through the legislative body of a public entity or through a vote of the residents of a public entity is irrelevant to the analysis. *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676-77 (1976), where the Court noted that a referendum was "the City itself legislating through its voters."

all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhatten CATC Corp.*, 458 U.S. 419, 440 (1982). *See also Pennell*, 485 U.S. at 13.

There are some who would have this Court abandon its long-held deferential standard and retreat to the era of *Lochner v. New York*, 198 U.S. 45 (1905), in which the courts substitute their judgment for legislative determinations as to whether particular legislation "may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical*, 348 U.S. at 488.

It is this second guessing that seems to underlie *Hall*. ("[T]he relationality of rent control *vel non* may have to be reassessed in light of this growing body of thought on the subject."). *Hall*, 833 F.2d at 1281 n.26.

This Court has for decades shown great deference to legislative judgments as to the "fit" or nexus between means and ends. Even under a heightened standard of scrutiny in substantive due process analysis, however, the Econdido ordinance passes muster because of the substantial nexus between the prohibition of the unlimited rent increases upon on-site sale and the protection of the investments of mobilehome owners.

In *Azul Pacifiico, supra*, 91 C.D.O.S. 8840, ——, F.2d ——, the 9th Circuit Court of Appeals found that the City of Los Angeles' mobilehome rent control law, which is essentially the same as Escondido's, constituted a taking under the *Hall* analysis, but upheld the Los Angeles ordinance against a substantive due process attack under a theory of heightened scrutiny taken from *Nollan*. The Court read *Nollan* to require a "close analysis" of the means used in a takings case. *Id.* at 8842. Even with the heightened scrutiny, it found that the vacancy control protected existing tenants from being forced to sell their units at distress-sale prices in cases in which the park owner set the rents so high for an incoming tenant that

no one would want to buy the existing tenant's mobilehome. *Id.* at 8842. Judge Kozinski wrote:

> The correctness of the city's decision to insure coach owners against unscrupulous landlords in this way is a legislative question, not a judicial one . . . Because the vacancy control provision serves the same governmental purpose—protecting incumbent tenants —as the [Los Angeles ordinance], we cannot say that it is unconstitutional. Unlike the city's other rationales, this one falls within the traditional police power and thus there is a sufficient nexus between the challenged provision and legitimate justification.

Id. at 8842.

Whether other polices are, or are not, well-served by the ordinance—whether, for example the supply of low cost housing will increase, decrease, or remain unchanged as a result of the ordinance—are questions best left to local governments to decide. So long as the ends are legitimate and the means bear a rational nexus to those ends, local legislation such as the Escondido Ordinance does not offend substantive due process.

CONCLUSION

The mere fact that economic controls are placed on the owner of a mobilehome park to prevent excessive rent increases upon in-place transfers and that these controls result in economic benefit to the mobilehome owner does not mean there has been a taking or a violation of substantive due process.

Acceptance by this Court of the notion that regulation of the economic relationship between a landlord and a tenant results in a trespassory physical invasion of property requiring compensation would cast a shadow of doubt over all regulation of property. This Court should not retreat from its precedents that economic and property regulations are valid if a legitimate governmental pur-

pose is furthered and the property owner retains an economically viable use of the property. This Court should not accept a theory which would subject legislation to microscopic analysis of which particular property right is affected and to what extent it is impacted.

Vacancy control is a direct and rational police power regulation which advances the legitimate governmental interest in protecting the mobilehome owner from the adverse impacts of excessive rents in light of the difficulty in moving mobilehomes and the shortage of mobilehome spaces. The mere fact that economic controls which prevent excessive rent increases upon in-place transfer may result in an economic benefit to the mobilehome owner does not mean there has been a taking or violation of substantive due process. These controls do not deprive the mobilehome park owners of legitimate investment backed expectations in land or of a fair return on investment.

This Court has long recognized the right of the legislature to regulate economic and property relationships. In order to reverse the court below, this Court must reject a long line of precedent.

Therefore, the California Appellate Court decision in *Yee v. Escondido* should be upheld.

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IN THE
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JOHN K. YEE and IRENE YEE, *et al.*,
Petitioners,

v.

THE CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF OF GOLDEN STATE MOBILHOME OWNERS LEAGUE, INC., NATIONAL FOUNDATION OF MANUFACTURED HOMEOWNERS, AND DESIGNATED MOBILEHOME OWNERS ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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Mobilehome Owners League of the Silver State, Inc.

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National Foundation of Manufactured Homeowners

New England Council of Manufactured Housing Residents

Park Resident Home Owners Association, Inc., a New York State Organization

Pennsylvania Manufactured Home Owners of America, Inc.

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BRIEF OF GOLDEN STATE MOBILHOME OWNERS LEAGUE, INC., NATIONAL FOUNDATION OF MANUFACTURED HOMEOWNERS, AND DESIGNATED MOBILEHOME OWNERS ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Amici Curiae submit this brief with the written consent of all parties filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

Amici curiae are eleven state mobilehome owner associations and the national organization of mobilehome owners. The membership of each association is substantial. The Golden State Mobilhome Owners League, Inc., for example, is a nonprofit California corporation of some 200,000 persons living in nearly 100,000 mobilehomes throughout California. Amici's members live in mobilehome parks and pay monthly rent to the park owner for the space on which their home resides.

Amici curiae have a substantial interest in the continuing ability of local governments to enact ordinances that

protect their property interest in their home. A large percentage of amici's homeowner members are retired Americans on fixed incomes or low and moderate income families for whom the mobilehome is the only feasible means of home ownership. The members of the amici organizations have made a substantial investment in their homes and in improvements to the space on which their homes are located. This investment can be rendered worthless if petitioners' effort to invalidate Escondido's Rent Protection Ordinance is successful.

SUMMARY OF ARGUMENT

Petitioners' challenge to Escondido's Rent Protection Ordinance ("Ordinance") implicates far more than a single municipality's effort to control rents in mobilehome parks: it challenges the entire body of California State law that has developed in response to the economic and technological innovation of the mobilehome.

The modern factory-built home that can be transported to a small site and permanently installed, without all the infrastructure of a conventional single family home, is a technological and economic breakthrough in the provision of affordable owner-occupied housing. "[T]he mobile home must be regarded as a genuine innovation, meeting needs which conventional housing has left unsatisfied." [1] Indeed, it has been called a "Revolution in American Housing"; [2] mobilehomes are the only kind of housing that many moderate-income American families can reasonably afford.[3]

There is no traditional property rule to govern the "genuine innovation" of the modern mobilehome. Unlike a conventional tenant's fixtures or a commercial tenant's improvements, it is a distinctively American innovation linked to the American dream of home ownership. In actual operation, the economics of this new type of housing required a legally innovative split estate where one party owned the dwelling and another owned the underlying land. This form of property ownership gave park owners considerable economic power over mobilehome owners and posed questions that had not previously presented themselves in the setting of modern home ownership.

The novelty of such separate ownership required the state to exercise its authority to define the respective rights of the co-proprietors. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Munn v. Illinois*, 94 U.S. 113, 134 (1877). That is exactly what the State of California ("State") did over a period of several decades by enacting numerous laws to protect mobilehome owners' equity investment in their homes.[4] Those laws, which define the property rights of park owners and homeowners in mobilehome parks, recognize the homeowners' entitlement to a property interest that reflects the price the home would sell for, with security of tenure in its location.

In turn, the State found that the park owners' economic power to deprive homeowners of their equity in their homes resulted from the limited supply of mobilehome spaces and the homeowners' "sunk" investment on-site, and was not a protectable property interest. The State's definition of the respective property rights of the mobilehome owners and park owners was well within its authority to define property rights in a new situation so long as it did not unreasonably impair the park owner's use of its property. *PruneYard Shopping Center v. Robins*, 447 U.S. 73, 83 (1980). Escondido's Ordinance, like that in jurisdictions throughout California and the United States, implements these state laws in a form that they explicitly authorize.[5]

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[1] Wallis, *Wheel Estate* (1991) at 20.

[2] Drury, *Mobile Homes, The Unrecognized Revolution in American Housing* (1972).

[3] Wallis, *supra* note 1 at 14.

[4] California law governing mobilehomes is codified in California Civil Code section 798 et seq. (West 1983 and Supp. 1991).

[5] Cal. Civ. Code section 798.17(a) allows a mobilehome owner to demand a rent-controlled tenure of twelve months or less whenever a local government adopts an ordinance or initiative measure estab-

Petitioners claim that the Escondido law results in a physical taking of their property because it transfers a possessory interest of the park owner (the right to occupy the property in its park at below market rates) to the homeowner and it allows the homeowner to market this interest. Specifically, petitioners challenge the provisions of the Escondido Ordinance that preclude park owners from automatically raising rents whenever a mobilehome is sold in place. Petitioners also allege this provision violates their right to substantive due process because it is not rationally related to a legitimate government interest.

Properly framed, this is a definition of property case, not a taking case. The appropriate starting point for resolving this property dispute is to ask whether California, when faced with this new form of property ownership, had the authority to protect the equity investment of mobilehome owners by allowing them to sell their home with security of tenure in its location. The second issue that this Court must address then, is whether Escondido's Ordinance is consistent with the State's definition of those property rights. Amici respectfully submit that the Court should answer both questions in the affirmative and uphold the constitutionality of the Escondido Ordinance.

ARGUMENT

I. THE TECHNOLOGICAL INNOVATION OF THE MOBILEHOME REQUIRED THE STATE OF CALIFORNIA TO DEFINE THE RESPECTIVE RIGHTS OF THE PARK OWNER AND THE MOBILEHOME OWNER AS CO-PROPRIETORS IN THIS UNIQUE FORM OF HOME OWNERSHIP.

A. California Has the Authority To Define the Mobilehome Owners' Estate in Their Homes.

New forms of ownership, new technologies, and new economic and material conditions in a state generate changes in the rules of real property law. The principle

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lishing a maximum amount that a park owner may charge a mobilehome owner for rent.

is as old as the Union; in the Eighteenth Century "some of our states quickly took advantage of their newly acquired independence to abolish all feudal tenures by legislative fiat."[6] "In a changing world, it is impossible that it should be otherwise." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (zoning not a violation of property rights).

States have power to enact laws that respond to technological and economic changes. *Munn v. Illinois*, 94 U.S. at 134. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577. The State is not compelled to leave the parties to whatever physical or economic power one has over the other, or to leave them to whatever they can obtain by contract. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937).

The state's power to define property interests is not unlimited. It may not "unreasonably impair" an owner's use of his property, *PruneYard Shopping Center v. Robins*, 447 U.S. at 83, intrude on the "sphere of private autonomy," *id.* at 93 (concurring opinion), or simply abrogate common law remedies. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 (1978). Nor may the state simply transform private property into public property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (declaring invalid the transfer of interest on private interpleader funds to public accounts). So long as it respects these precepts and does not, in the absence of changed circumstances, reverse a "usual and general rule" of property, the state is and must be free to adapt to new circumstances.

There are numerous examples throughout our history of legislative and judicial responses to technological and economic innovations. Thus, the invention of the airplane

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[6] Vance, "The Quest for Tenure in the United States," 33 *Yale L.J.* 248, 249 (1924).

led to a change in the common law definition of property through recognition of navigable airspace. *United States v. Causby*, 328 U.S. 256, 260-61 (1946). Modern timber harvesting diminished riparian rights and created a public right of passage by developing the floating log test of navigability in place of the common law rule that only ship traffic demonstrated navigability. *Lancy v. Clifford*, 54 Me. 487, 491 (1867). The modern company town and the contemporary shopping center brought modifications in the law of trespass. *Marsh v. Alabama*, 326 U.S. 501 (1946) (access to company town); *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971) (access to migratory farm workers on employer's land); *PruneYard Shopping Center v. Robins*, 447 U.S. at 82 (political soliciting in shopping center).

The new and unique form of property ownership created by the modern mobilehome presented the State of California and its local governments with a circumstance they had never before encountered. The economic necessities of low cost homeownership required that a mobilehome be sited on land owned by another, where it did not have security of tenure. Park owners, because of this split estate, the limited supply of mobilehome spaces, and the homeowners' "sunk" investment on-site, obtained a controlling economic power over the equity of mobilehome owners in their home.

The property interest that petitioners claim was taken by the Escondido Ordinance is the product of the park owner's economic power over homeowners. That power grows out of immobility, not out of the natural force of supply and demand, and is thus a species of monopoly after the fact. The interest claimed by the park owners represents their power to deprive mobilehome owners of their equity investment in their homes; it is not a constitutionally protected property right. Since the beginning of the modern mobilehome era and the emergence of the split estate, California, like other states in this country where mobilehomes comprise a significant portion of the affordable housing stock, has determined that the right of sale with security of tenure in its location resides in the

homeowner.[7] Because the park owners never possessed the interest they now claim, the Escondido Ordinance has taken nothing from petitioners.

B. The State Has Responded to the Peculiarities of the Mobilehome Market by Allocating Important Property Rights to the Homeowners.

1. *Mobilehomes Are the Predominant Form of Unsubsidized Affordable Housing in the United States.*

Nothing illuminates the conflict in this case better than the phrase petitioners have chosen to describe the mobilehome: They call it "depreciable personal property." (Brief for Petitioners (hereinafter "Brief"), at 28.) For 12.5 million Americans, a mobilehome is their dwelling; for people of modest means, old and young, a mobilehome is the only home they can hope to own.[8] Manufactured housing accounted for almost 36 percent of all single-family homes sold in the United States in 1981, and for the vast majority of those sold for under $50,000.[9] Older Americans on fixed incomes and more than 80 percent of young households who do not own a home already can only afford to buy a mobilehome.[10]

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[7] *See infra* note 57, and accompanying text.

[8] A study by the California Department of Housing and Community Development ("HCD") estimates that families earning only 50 to 80 percent of the median income in their area could afford to buy a mobilehome. HCD, *Incentives for New Family Mobilehome Parks in California* (hereinafter "*Incentives*") (1986) at 6.

[9] Baar, "The Right to Sell the 'Im'mobile Manufactured Home in its Rent Controlled Space in the 'Im'mobile Home Park: Valid Regulation or Unconstitutional Taking?," 24 *Urban Lawyer* No. 2 (forthcoming Winter 1992), citing *Report of the President's Commission on Housing* (1982) at 85-86.

[10] Nutt-Powell, *Manufactured Homes* (1982) at 67. In Escondido, a mobilehome on-site costs about one-third to one-quarter of the price of a conventional site-built home. Compare sales data from Berlin Research Corporation, *Mobile Home Sales Report* (1991) to "Southland Home Prices for San Diego County," *Los Angeles Times* (November 17, 1991).

For young and old, home ownership with an equity interest is strongly desired. The rental apartment is not a satisfactory alternative because it meets none of the four basic norms of Americans' housing preferences: ownership, detached dwelling, private outdoor space, and conventional construction.[11] In contrast, the mobilehome meets three of those criteria. Not surprisingly, therefore, rental apartments and owner-occupied mobilehomes are distinct markets.

Contrary to petitioners' assertions, the modern mobilehome is not a depreciating asset. The average mobilehome, like the average site-built home, retains its value over decades. It is a dwelling that is maintained, improved, and cared for just like conventional site-built homes and that "appreciate[s] in value when properly located, maintained, and cared for."[12] The only difference is that the owners are on average less affluent, often because they are retired and living on pensions. The average age of mobilehome owners in Escondido is 64.4 years.[13] In 1988 the median family income of Escondido mobilehome owners was $15,500.[14]

Modern mobilehomes, many as large as 1400 square feet,[15] cost tens of thousands of dollars retail and home-

[11] Tremblay & Dillman, *Beyond the American Housing Dream: Accommodation to the 1980's* (1983) at 14.

[12] "Better Way to Appraise Mobile Homes," *Banking* (October 1978) at 118. Mobilehome prices appreciate in states even without rent control. HCD, *Manufactured Housing for Families: Innovative Land Use and Design* (hereinafter "*Manufactured Housing for Families*") (1986) at 13-15, showing rapid appreciation of mobilehome prices in Arizona even though the state preempts rent control; *see* Az. Stat. Ch. 11 § 33-1416 (West 1990).

[13] San Diego Association of Governments, *City of Escondido Mobile Home Needs Survey* (1988) at 5.

[14] *Id.* By comparison, the 1990 median income for all households in the San Diego area was $37,900. San Diego Association of Governments, *City of San Diego Mobile Home Needs Survey* (hereinafter "*San Diego Mobile Home Needs Survey*") (1990) at 9.

[15] Anderman, *The Manufactured Housing Alternative* (1981) at 13; *San Diego Mobile Home Needs Survey, supra* note 14 at 14.

owners invest thousands more in improvements and landscaping, as well as placement on their site. In 1988 the average retail cost of a double-wide mobilehome in California was $40,000.[16] Purchasers buy and move into well-maintained homes that are often well over twenty years old, going back to the beginning of the era of the modern, larger mobilehomes.[17]

The single example cited by Judge Kozinski in *Azul Pacifico, Inc. v. Los Angeles*, —— F.2d ——, —— (9th Cir. 1991), 91 Daily Journal D.A.R. 13599 (1991), and repeatedly cited by petitioners (Brief, at 10, 14, 20) of an individual who bought a mobilehome on-site and scrapped it, is a highly unusual situation. As with site-built homes, the overwhelming majority of mobilehomes are bought to be lived in, and the sellers have a substantial equity investment to protect. By isolating the extremely atypical case of "one Mrs. Morrison," the opinion in *Azul Pacifico* suggests that the home itself is worthless. Exactly the opposite is the case. Almost all mobilehomes are sold in place as sound dwellings to buyers who will live in them.[18]

2. *Mobilehome Owners Are Uniquely Vulnerable to Losing the Investment in Their Home.*

a. *The Mobilehome Owners' Substantial Investment in Their Homes and Scarcity of Alternative Locations Limit Their Options.*

Mobilehome owners are in a unique, and uniquely vulnerable, position. They cannot pack up and leave when rents rise. Their homes sit on land owned by someone else—a pervasive necessity of the economics of the mobilehome as affordable housing. Even if vacant spaces

[16] *Manufactured Housing for Families, supra* note 12 at 7-8. This amount does not include transportation and setting on site.

[17] Recent published sales figures for Escondido show many transfers of mobilehomes that were built in the early to mid-1960's, and many more that date to the early 1970's. Berlin Research Corporation, *supra* note 10.

[18] HCD, *Mobilehome Parks in California* (1986) at 19, stating that more than 90 percent of mobilehomes that are sold remain in the park.

were available (there are virtually none in much of California),[19] the cost of moving a sizeable mobilehome is between $10,000 and $12,000.[20] A mobilehome thus has considerably more value if it can remain on-site than if it must be moved elsewhere. This fact permits the "opportunistic behavior" that is created whenever one party is obliged by circumstances to make an immobile capital investment on the land of another.[21] This power may be called opportunistic monopoly, or monopoly after the fact. Once the mobilehome is installed on its pad, the unprotected homeowner will submit to above-market rents simply to avoid the cost of moving. The park owner's power to capture for himself those sunk investment costs is an undeserved windfall called "quasi rent." Even Hirsch & Hirsch speak of this monopoly profit potential as a "hold up" of the incumbent mobilehome owner.[22]

Scarcity increases the mobilehome owner's vulnerability. The virtual absence of vacant pads means the homeowner has nowhere to move. He is thus vulnerable not only to loss of moving costs, but to the entire equity in his home if he has no entitlement to security of tenure for himself or for a successor in his location. If there were no scarcity, the mobilehome owner could move and at least protect his investment, minus the cost of moving. But where there are no vacant sites available, scarcity permits a park owner to drive the home's price down to salvage, ordinarily only a few thousand dollars.[23] What

[19] Pad vacancies are about 3 percent statewide and near zero in many California communities. *Mobilehome Parks in California*, *supra* note 18 at 17.

[20] Wallis, *supra* note 1 at 15.

[21] O. Williamson, *Market and Hierarchies: Analysis and Anti-Trust Implications* (1975).

[22] Hirsch and Hirsch, "Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol," 35 *U.C.L.A. L. Rev.*, 389, 436 (1988).

[23] Note: "Mobile Home Parks and Connecticut's Regulatory Scheme; A Takings Analysis" (hereinafter "Mobile Home Parks and Connecticut's Regulatory Scheme"), 17 *Conn. L. Rev.* 811, 815, and n. 19 (1985).

usually is a source of appreciation becomes, for the mobilehome dweller, a trap.

b. *Rent Control Is a Response to Scarcity; It Is Not Responsible for Scarcity.*

Rent control did not create scarcity in the mobilehome market; it was a response to scarcity largely created by restrictive zoning and the landowner power it generated. "As urban areas grew, [cities] annexed the parks along with everything else. . . the only land zoned for [mobilehome parks] was often what they already occupied."[24] Although total exclusion is often barred by legislation and the courts, new laws permitting mobilehomes to be placed on land zoned for residential use produce virtually no results, as land prices are too high to make the use of such large tracts economical.[25]

Scarcity persists because other, higher density uses are more profitable than mobilehome parks, whether or not there is rent control.[26] For example, if controlled rents limit return to 8 percent, while uncontrolled rents would produce a 12 percent return, profit maximizing landowners will still reject mobilehome parks in favor of high rise apartments or office buildings which can produce a 15 percent return. Where land prices are high, mobilehomes are unlikely to be built.[27] For that reason, few new

[24] Wallis, *supra* note 1 at 16; *see also* "Manufactured Housing: The Invalidity of the 'Mobility' Standard," 19 *The Urban Lawyer* 367 (1987).

[25] HCD, *Local Government Mobilehome and Mobilehome Park Policies in California* (hereinafter "*Local Government Policies*") (1986) at 13; Comment: "California Government Code Section 65852.3: Legislature Prohibits Exclusion of Mobile Homes on Single-Family Lots," 16 *U.C.D.L. Rev.* 167 (1982).

[26] Rent control was cited in a survey of local governments in California as the reason for not submitting a mobilehome park development application in only one percent of the cases. Lack of suitable land, costs, economics, and poor demand were dominant considerations. *Local Government Policies*, *supra* note 25 at 31.

[27] "New parks must compete against higher intensity alternatives." *Incentives*, *supra* note 8 at 17. Where county land prices are high, the distribution of mobile home parks is low. State of

mobilehome parks are being built in Southern California and it is unlikely that new mobilehome parks will be built on any land in Escondido.[28] The decline in the number of new mobilehome parks in California over the last several decades is attributable fundamentally to increased demand for high density uses, not to rent control.

c. *In the Absence of Regulation, Park Owners Have Exercised Their Substantial Economic Power To Drive Mobilehome Prices Down, Leaving the Homeowner With a Worthless Investment.*

The history of park owner abuses of their economic power over mobilehome owners has been documented over the years.[29] For example, park owners charged entrance and exit fees, required homeowners to buy their homes from the parkowner or a specified dealer, and rejected new tenants without the payment of a fee.[30]

Park prohibitions of on-site sales allowed park owners to evict current howeowners and collect entrance fees from incoming homeowners—with disasterous consequences for the evicted homeowners.

> [T]he evicted homeowner must not only move himself but must also move his home. The owner, in effect,

New Jersey Legislative Study Commission, *Report and Recommendations of the Mobile Home Study Commission* (October 1980) at 93.

[28] Escondido already has 31 mobilehome parks, and while homeowners may place mobilehomes on individual lots, none of the vacant residential property is zoned for mobilehome parks.

[29] Manheim, "Tenant Eviction Protection and the Takings Clause," 1989 *Wisc. L. Rev.* 925, 965, n. 224; "Mobile Home Parks and Connecticut's Regulatory Scheme," *supra* note 23 at 815-816; *Ware v. Trailer Mart, Inc.*, 623 F. 2d 1150 (6th Cir. 1980) (requiring purchase of mobilehome from park owner is violation of Section 4 of the Clayton Act, 15 U.S.C. § 15); *Sherman v. Mertz*, 42 Cal. App. 3d 769 (1974) (kickbacks on profits from sale of mobilehomes a restraint of trade).

[30] "Tyranny in Mobile-home Land," *Consumer Reports* (July 1973) at 441. *See also Suburban Mobile Homes v. AMFAC Communities*, 101 Cal. App. 3d 532 (1980) (requirement that mobilehomes could only be purchased from specified dealers violated California's anti-trust laws).

> faces the options of abandoning the home, attempting to sell it, or moving it into storage until a new pad is obtained. All of these options may destroy the homeowner's equity in his unit . . . [T]he mobilehome park owner may have strong incentives to evict his tenants whenever possible.[31]

Exemptions from this prohibition could be purchased, with prices—even in 1973—varying between $250 and $2,700.[32]

The legislative staff analysis for the 1973 California bill that prohibited forced removal of mobilehomes upon sale noted:

> it is alleged that the management often obtains a very large commission for directing purchasers to the tenant, which the tenant must pay if he wants the new purchaser to be able to move into the park.[33]

These abuses allowed park owners to monetize their power over homeowners.

II. STATE LAW PROTECTS THE PROPERTY INTERESTS OF MOBILEHOME OWNERS FROM SIGNIFICANT DIMINUTION BY PARK OWNERS.

A. The Mobilehome Owner as Co-Proprietor, Not Ordinary Tenant.

For more than twenty years the State of California has been legislating to "protect the investment of mobilehome owners" against abuses of economic power by park owners.[34] Owners of mobilehomes, as co-proprietors with

[31] Vernon, Note: "Mobilehomes: Present Regulation and Needed Reforms," 27 *Stanford L.Rev.* 159, 167 (1974).

[32] Tyranny In Mobile-home Land," *supra* note 30 at 441.

[33] Senate Local Government Committee, *Staff Analysis*, Assembly Bill 702, Wilson (amended August 14, 1973).

[34] Press Release dated May 17, 1973 by Assemblyman Bob Wilson, sponsor of the original law now codified at Cal. Civ. Code § 798.73, 1973 Cal. Stat. ch. 785, § 1. (In each of the ensuing statutory references, the current codified version may be somewhat different from the original law.)

a large capital investment, were found to be needful of "unique protection" both during their tenure and upon sale.[35] The legislature formalized its treatment of the mobilehome owner's co-proprietorship by explicitly substituting the term "homeowner" for the word "tenant" in the mobilehome residency law.[36]

The first problem to which the legislature attended was the practice of evicting homeowners to install someone who had bought a mobilehome from the park owner. In 1969 legislation imposed notice requirements on eviction [37] and two years later prohibited eviction for the purpose of making a space available for a homeowner who purchased the home from the owner of the park.[38]

Although they lost the power to evict in order to install their own buyer, park owners could achieve the same economic benefits by imposing charges on mobilehome sellers and their buyers.[39] In 1972 the State blocked this stratagem by prohibiting entry charges on new homeowners and transfer charges as a condition of sale by incumbent homeowners.[40] A year later the law extended the protections against eviction by prohibiting termination of the tenancy of incumbent homeowners except for cause.[41] During the same year, the legislature barred park owners from requiring mobilehomes to be removed upon sale, another device by which the park owner could have devalued the home of incumbent homeowners.[42] A legislative staff report explaining the 1973 bill noted:

[35] 1975 Cal. Stat. ch. 146, § 1, now codified at Cal. Civ. Code § 798.55.

[36] California Civil Code §§ 798.8 and 798.9.

[37] 1969 Cal. Stat. ch. 1500, § 1, codified at Cal. Civ. Code § 798.55(b).

[38] 1971 Cal. Stat. ch. 1143, § 1, codified at Cal. Civ. Code § 798.58.

[39] *See supra* notes 29 to 33 and accompanying text.

[40] 1972 Cal. Stat. ch. 1001, § 1, codified at Cal. Civ. Code § 798.72.

[41] 1973 Cal. Stat. ch. 351, § 1(d), codified at Cal. Civ. Code § 798.56.

[42] 1973 Cal. Stat. ch. 785, § 1, codified at Cal. Civ. Code § 798.73.

> A second issue is past abuse of park operators who have exercised almost complete control over the sites and even what dealer would sell the mobilehome to be installed in the park. Because of few parks in only a few communities, operators [park owners] would require purchase from a specific dealer, and that they have exclusive right to control resale. They charged excessive fees and frequently did little to market the home. Homeowners took a bath on resale.[43]

In 1975 the legislature assured a qualified purchaser the right to take over the pad on which the home was sited. Despite all the laws previously enacted, if the park owners could nonetheless refuse tenancy to all purchasers, they would still be able to compel a sale to themselves or on terms that would make the mobilehome unsalable to anyone else. Without protection against rejection of purchasers, park owners could circumvent all the State laws enacted to protect the homeowner's investment in his mobilehome.

The law had previously provided that park owners had "the right to require prior approval of a purchaser if the mobilehome will remain located in the mobilehome park or other facility." [44] In the law of June 28, 1975, the legislature added this crucial passage:

> . . . provided, however, that the approval of a purchaser cannot be withheld if the purchaser as a prospective tenant has the financial ability to pay the rent and charges of the park. . . .[45]

With this provision, the State recognized definitively the property right of an incumbent homeowner to sell his home with security of tenure in its location. Implicit in the State's action is its refusal to elevate the economic

[43] Urban Development & Housing Committee, *Memo on AB 702*, Wilson (May 15, 1973).

[44] 1973 Cal. Stat. ch. 785, § 1, codified at Cal. Civ. Code § 798.74.

[45] 1975 Cal. Stat. ch. 146, § 3, codified at Cal. Civ. Code § 798.74.

power of park owners to the status of a protected property interest.[46]

California law recognizes the centrality of homeowner commitment to value in those things that determine neighborhood and locational quality, including investment in improvements and upkeep, maintenance of structures, landscaping, participation in neighborhood activities, and duration and stability of ownership. All of these conditions demand involvement by homeowners and they all add to the value of mobilehomes in place. The homeowner has an equity interest in the estate. Indeed, a Los Angeles study found that the investment of the average mobilehome owner in his home is triple the investment of the park owner in the space on which the home resides.[47]

California's determination of property interests was both reasonable and appropriate.

> Property rights serve human values. They are recognized to that end, and are limited by it. *Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.*

State v. Shack, 277 A.2d at 372 (emphasis added).

B. The Escondido Ordinance, Consistent With State Law, Protects the Mobilehome Owner's State-Defined Property Right While Guaranteeing the Park Owner a Reasonable Return on Its Investment.

Although State law does not explicitly impose any limit on the amount of rent the park owner can demand from the new howeowner, a limit to some reasonable amount is necessarily implicit in the 1975 provision requiring park owners to accept a qualified purchaser. The provision would be a nullity if a park owner could approve prospective tenants only on condition that they pay a pro-

[46] California, in recognition of the unequal bargaining power of the mobilehome owner and park owner, prohibits the waiver of its mobilehome owner protection laws. Cal. Civ. Code §§ 798.19, 798.77.

[47] City of Los Angeles Rent Stabilization Division, Community Development Department, *Mobilehome Parks Under Rent Stabilization* (1985) at 11, 33.

hibitively high rent (a rent, for example, that would only be affordable if the price of the mobilehome had dropped to salvage value). Escondido's Ordinance implements the homeowner's state-recognized property right by limiting the required rent to a "just, fair, and reasonable" amount. Escondido Municipal Code § 29-104(g) (*see* Joint Appendix ("J.A.") at 25).

1. *Escondido's Vacancy Control Ordinance Is a Logical Extension of State Law.*

The aim of the Escondido Ordinance's vacancy control provision, as well as the ordinances of numerous other local governments in California and elsewhere,[48] is to protect mobilehome values from decline by limiting the rental prices park owners can exact from new buyers. An unlimited power to drive rents up is an unlimited power to drive mobilehome prices down—until they reach scrap or salvage value, which is virtually nil even for the most expensive homes.[49]

Petitioners' claim that exorbitant rent increases are unlikely because park owners have no incentive to "deter listings and sales" is flatly wrong. (Brief, at 29.) Park owners have *every* incentive to deter sales and listings—to everyone but themselves. That is exactly what they have done; indeed, that is the power they claim. Arguing in their brief before the Court of Appeal, petitioners stated that without rent control, "the landlord could raise the rent to prohibitive levels and as a practical matter

[48] Local governments throughout California heave instituted mobilehome rent control, even where they do not have apartment rent control. These governments repeatedly cite the scarcity of mobilehome pad vacancies, the difficulty and cost of moving a mobilehome, and the ability of park owners to take advantage of this situation as the reason for implementing rent control. *See e.g.*, Chula Vista Municipal Code § 16.16.010; Morgan Hill Municipal Code § 5.36.010; Laguna Beach Municipal Code § 1.12.010; City of Fresno Ordinance No. 87-170; Salinas Municipal Code § 17.1-1. The Escondido Ordinance is similar to many of these other laws. J.A. at 21.

[49] "Mobile Home Parks and Connecticut's Regulatory Scheme," *supra* note 23 at 815 and n.19.

has both the right and the power to compel the removal of the tenant." Appellants' Opening Brief at 1.

The history of California's mobilehome park legislation shows that park owners have used their power over eviction, over access to land, and over future rents, to position themselves as the sole agents for, or buyers of, mobilehomes that are for sale in their parks.[50] Over fifty mobilehome owners in Salinas, California complained that park owners improperly rejected prospective buyers. Several homeowners reported that after they were unable to sell their homes to an outside buyer, the park owner bought the homes at below market value and then sold the homes at a profit.[51]

Unless a seller can guarantee his buyer that the mobilehome will not have to be removed from the premises, that the buyer will be accepted as a park resident, and that the buyer will be protected against prohibitive entry fees, transfer fees, and rents when he moves in, a homeowner has no way to protect his investment in the home. This is true whether or not the law prohibits the sale of the home to the park owner. Even where park owners do not engage in abusive rent practices, large increases in rent decrease the value of the mobilehome, and threaten the equity investment of the homeowner. The prospect of continued, unpredictable rent increases can make a mobilehome unmarketable.[52] Unlike ordinary landlords, park owners need not worry about sluggish sales or vacancies. The mobilehomes remain on the land; no matter how long it takes to sell them, and whether they are occupied or vacant, homeowners must continue to pay rent to the park owners.

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[50] *See supra* notes 29 and 33 and accompanying text.

[51] *Survey of Mobile Homeowners in Salinas*, Legal Services for Seniors, Salinas, California (1990) at 3. *See also* "Judge Hammers Landlord's Attorney for $25K," *Santa Barbara Independent* (April 11, 1991) at 11 (indicating that park owner at one mobilehome park proposed rental increase of 100 percent—from $300 to $600).

[52] *Manufactured Housing for Families*, *supra* note 12 at 14.

Moreover, steady increases in rent above the consumer price index can have significant adverse impacts on current mobilehome owners—especially older homeowners on fixed incomes—regardless of their impact on the value of the home. Cities throughout California have reported large rent increases in recent years.[53] For homeowners living on fixed incomes, rent increases above the consumer price index quickly exceed their financial resources.

The Escondido Ordinance is one important element in the long-standing effort to secure the property right of mobilehome owners in the value of their homes. The Ordinance simply implements State law on a local level by ensuring that park owners cannot circumvent the purpose behind the State law by charging exorbitant rents to prospective tenants. Without this protection, park owners could reject all new homeowners through rent increases.

2. *The Escondido Ordinance Does Not "Unreasonably Impair" the Park Owner's Right to the Use of Its Property.*

In implementing the homeowner's property right, the Escondido Ordinance protects the park owner's right against unreasonable impairment (*PruneYard*, 447 U.S. at 83) by providing for a reasonable return on investment, which is all that the Constitution demands. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 305, 310 (1989). The Escondido Ordinance makes no *ipse dixit* reversal of a usual and general property rule, *Webb's Fabulous Pharmacies*, 449 U.S. at 164, for it merely im-

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[53] Rents in petitioners' parks increased by 28-30 percent between 1986 and 1988; the consumer price index during that time rose by only 7.5 percent. U.S. Department of Labor, Bureau of Labor Statistics, *Consumer Price Index, San Diego, California* (August 15, 1991) at 1. *See also* Baar, *Mobile Home Ownership in Fremont* (1991) at 11 (in one example rents increased by 354 percent between 1972 and 1991, while the consumer price index during that same time rose by only 242 percent); *Survey of Mobile Homeowners in Salinas*, *supra* note 51 at 1 (indicating that average annual rents increased at two to three times the consumer price index). Generally, rental housing prices increase at only 65 percent of the consumer price index. *Id.*

poses rent control, a permitted limitation on landowners since 1921. *Block v. Hirsch*, 256 U.S. 135 (1921); *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

Nor can park owners claim the ordinance deprives them of a reasonable investment-backed expectation. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Any of the devices by which park owners could drive mobilehome prices down to salvage value, such as the power to evict, remove, deny qualified successors, or charge excessive rents, are not constitutionally protected property interests. Petitioners' economic interest is derived from two forms of monopoly power: one resulting from the scarcity of land available for mobilehome park development and the other gained as a result of the homeowner's sunk investment in his home. "No one has a legitimate claim of entitlement to monopoly profits." *Chicago, Milwaukee, St. Paul & Pacific R. Co. v. United States*, 799 F.2d 317, 327 (7th Cir. 1986) (Easterbrook, J.). The State has determined that this power to exploit does not represent a property interest of the park owner.

III. CALIFORNIA'S LEGISLATIVE RESPONSE TO THE DEFINITIONAL PROBLEM POSED BY MOBILEHOME OWNERSHIP IS ENTIRELY CONSISTENT WITH THE RESPONSE OF OTHER JURISDICTIONS TO SITUATIONS OF DIVIDED OWNERSHIPS.

When new forms of divided ownership have appeared, the states have had to define property rights appropriate to the circumstances. Condominium ownership is the most familiar example. It raises an analogous problem to that of the mobilehome owner and park owner and it has generated similar rules. While a condominium association is not a landlord seeking rent, it can and does have interests distinct from those of a single homeowner, and it also has economic power because of the sunk investment of the homeowner. When a condominum owner wishes to sell his unit and is subject to the approval of the condominium board, courts hold that the necessary approval may not be withheld except upon reasonable grounds, such as

the financial capacity of the buyer.[54] Where the board is allowed to exercise a right of refusal, it is obliged to provide a buyer at an equally favorable price. *Chianese v. Culley*, 397 F. Supp. 1344 (S.D.Fl. 1975). The board cannot use its powers of refusal to devalue, or capture for itself, the value of the condominium unit.

Another analogous situation arose in Hawaii, where large landowners refused to sell land and required that homes be sited on their land under lease. The state enacted a land condemnation plan whereby the underlying land was acquired from landowners at fair market value and resold to homeowners. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 234 n.2 (1984). The novel question for the state then was what part of the total, in a split estate, belonged to the landowner, and what part to the homeowner. *Id.* at 244. Under Hawaii law, the landowner is not entitled to everything that its power position would have allowed it to capture in a scarce marketplace; instead, Hawaii attributed to the homeowner the value of his property investment by way of his improvements and enhancements of both the lot and the neighborhood. Hawaii Rev. Stat. Ann. Title 28 § 516-1 (Supp. 1989) (defining "owner's basis").

Both the United States and England faced a similar problem that grew out of landowner practices in the Nineteenth Century. In England, many landowners refused to sell their land, and homeowners were obliged to build their homes on another's land under 99 year leases. As those leases reached termination in the Twentieth Century, homeowners were threatened with having to "remove" their buildings, which effectively meant selling to the landowners at scrap value. Parliament responded with legislation permitting the homeowners either a 50-year lease extension, or a right to purchase the underlying land, at governmentally-approved prices, rather than

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[54] *See, e.g., Aquarian Foundation, Inc. v. Sholom House, Inc.*, 448 So.2d 1166 (Fla. Ct. App. 1984); *Laguna Royale Owners Association v. Darger*, 119 Cal. App. 3d 670 (1981).

the price the landowner could have exacted as a result of the homeowner's sunk investment. The purpose, and result, of the legislation was to protect the homeowner's investment value against landlord economic power.[55]

In some American states, statutes granted lessees with similar long term leases a non-waivable right to buy the underlying property in fee. The statute set a reasonable price for the property, although it was a lower price than the landlord could exact as a result of his economic power over the homeowner. The American law, recognizing the homeowner's right to realize the investment value of his home in place, set a maximum price the landlord could demand. *Stewart v. Gorter*, 16 A. 644 (Md. 1889).[56]

As the preceding examples show, jurisdictions have followed various approaches in determining the incidents belonging to each of the co-proprietors. In each case, the jurisdiction has diminished the economic power of the unregulated landowner in favor of the homeowner, while guaranteeing it a just, fair, and reasonable return on investment. California and Escondido have done no more through their recognition of the property rights of the mobilehome owner and the park owner.[57]

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[55] *Leasehold Reform in England and Wales*, Presented to Parliament by the Minister of Land and Natural Resources by Command of Her Majesty (H.M.S.O., Feb., 1966) at 4-5, describing the proposal that became the Leasehold Reform Act of 1967, section 1(1). *Halsbury's Laws of England*, Vol. 27 ¶ 1001, 4th Ed. (Butterworths 1981 & Supp. 1990).

[56] *See also* 16 U.S.C. § 20e (West 1991) (United States must compensate companies operating businesses in National Parks for loss of their structures if the government terminates their concession contract).

[57] California's approach to the split ownership situation is similar to the approach taken throughout the United States. Many states require that park owners give homeowners renewable leases. Mass. Gen. Laws Ann. ch. 140 § 32J (West 1979 & Supp. 1991); Vt. Stat. Ann. tit. 10, § 6237 (Equity 1984 & Supp. 1991); Pa. Stat. Ann. tit. 68 § 398.3 (West 1984 & Supp. 1991). Three other states permit a selling homeowner to transfer his lease to the purchasing homeowner and prohibit the park owner from rejecting the purchaser except for an inability to pay rent, refusal to follow park rules, or evidence of illegal use of the mobilehome. Mass. Gen. Laws Ann. ch. 140 § 32M (West 1979); Vt. Stat. Ann. tit. 10, § 6240 (Equity 1984 & Supp. 1991); R.I. Gen. Laws § 31-44-4(f) (Michie 1982 & Supp. 1991).

IV. ESCONDIDO'S VACANCY CONTROL ORDINANCE SATISFIES THE CONSTITUTIONAL REQUIREMENTS DEMANDED OF REGULATORY ENACTMENTS.

Although this is a definition of property case, the Escandido Ordinance plainly survives scrutiny under this Court's regulatory taking standards. There is a legitimate interest in protecting homeowner values; the state may define homeowner values to include locational value, as well as investment and improvement value over and above salvage value. Moreover, homeowner values are and have been diminished by the behavior of park owners; there is thus a nexus between the harm caused by park owners and the remedy that both the state legislation and local ordinance have fashioned.

The remedy that the State and City of Escondido have chosen, affording homeowners locational value by means of statutorily-created rights of tenure and transfer in location, and by limiting charges that could thwart realization of those rights, is tightly fitted to the harm.[58] Indeed, the remedy achieves precisely the purpose of mobilehome policy; the intended beneficiaries of the law are in fact benefitted—both incumbent and future owners—in the form of stabilized home values and opportunities to accrue enhancement value upon sale. Insofar as certain beneficiaries (incumbent homeowners) realize an additional benefit, that is a necessary and inevitable result of new laws and legal interpretations, whether they result from legislation or from judicial decision.

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[58] The alternative suggested by petitioners is no alternative at all. (Brief, at 29.) They simply propose the repeal of vacancy control laws, which would defeat the precise and legitimate purpose that the Escondido Ordinance seeks to achieve.

A. Contrary to Petitioners' Claim, Escondido's Vacancy Control Ordinance Confers Substantial Advantages Upon Successor Homeowners.

Petitioners argue that successor mobilehome owners obtain no benefit from the law, suggesting that all the benefit is captured and carried away by the incumbent homeowner-seller. (Brief, at 23-24.) This contention is erroneous.

Even if the sales price of mobilehomes were to rise immediately after the imposition of vacancy control, there would be substantial benefits to each new generation of buyers.[59] Where new owners improve and maintain their mobilehomes, or enhance the quality of the neighborhood, they will be able to realize the increased value of their home and its environs when they sell. If new residents could not assure their buyers, in turn, the right to tenancy at a controlled price, the park owner would be able to capture such added value over and above the value of the home when the homeowner bought it. The law thus assures homeowners the ability to realize the benefits of what they put into the property when they decide to sell.

The law also frees purchasing homeowners from instability arising from strategic behavior on the part of the park owner. Park owners sometimes underprice the rental amount for a pad for their own reasons (for example, they may seek to ward off additional government regulation of their industry).[60] Insofar as home prices and rentals are complementary, home prices will rise during such a period. One who buys during a period of rental underpricing will pay a higher home price. Later, when it comes time to sell, park owners may be charging maximum rents and home prices will then fall. The homeowner caught in such circumstances will have bought high, but have to sell low. While home prices always vary to some extent with market conditions, most homeowners are not forced into a speculative market, where— in order to invest wisely in their homes—they must be skillful guessers about landlord pricing and turnover strategies. In the absence of vacancy control, park owners have an incentive to promote turnover in tenancies, which in turn promotes instability. Vacancy control laws reduce speculative risk and import stability into the mobilehome market.

[59] Some buyers will find that mobilehome prices do not rise automatically to absorb the economic value of vacancy control. Where mobilehome sales are sluggish, eager sellers may keep prices down to attract buyers quickly. Nor are people always rational maximizers. In such cases, buyers will benefit from controlled rental prices.

[60] Hirsch and Hirsch, *supra* note 22 at 445.

B. The So-Called Windfall to Incumbent Homeowners Is a Common Benefit Enjoyed by All Incumbents When Government Creates or Redefines Property Rights.

The fact that homeowners in place at the time of the law's enactment receive a special benefit is inevitable and constitutionally irrelevant. (Brief, at 25-28.) When a law changes or creates new rights, incumbent owners obtain an additional benefit beyond what their successors get, simply because they are in place at the time of the law's enactment.

For example, owners of property along the California coast who bought their land at a cost reflecting the prospect of a beach access easement received a windfall because they were in place when this Court invalidated a similar easement in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Their property values would rise to reflect the economic value of the new legal rule. When they sell their properties, they will reap the capitalized value of that change.

As property rules inevitably change, or as new technology results in new property interests, incumbent owners who are in the right place at the right time reap a special gain from the change. *See e.g., Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (overruling the property rule of *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)).

V. THE ESCONDIDO VACANCY CONTROL ORDINANCE DOES NOT CONSTITUTE A PHYSICAL INVASION TAKING UNDER THE *LORETTO* DOCTRINE.

A. The Escondido Ordinance Does No More To Transfer a Possessory Interest in Property Than Do Any of the State Provisions.

The claim that the Escondido Ordinance in conjunction with the California Mobilehome Residency Law is a taking of a "possessory interest in the realty" of the park owner sweeps extraordinarily broadly. (Brief, at 14.) Each of the State law protections, enacted over twenty years, creates in the mobilehome owner a present possessory interest in the realty of the park owner, an interest the homeowner did not have by lease or contract. Each provision empowers the homeowner to exercise those rights at a price below that at which the park owner would have voluntarily granted such rights. Unless it is assumed that park owners could have thwarted all those laws by charging some exorbitant rent as a condition of their exercise, the Escondido Ordinance no more constitutes a taking within the meaning of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), than do any of the State laws. All the Escondido Ordinance adds is the right of a purchasing homeowner to pay the same rent for the space as the seller, while still allowing a reasonable return to the park owner.

It is true that not all the State laws relate to the sale of the mobilehome on-site. Some rights under the State law, such as the protection against eviction, are vested in the incumbent resident. But there is no rational basis for distinguishing, as a matter of constitutional taking doctrine, between a right to sell the mobilehome to another and the right to have one's own tenancy extended. In each case, the purpose of the State law is to protect the investment value of the mobilehome against the efforts of the park owner to drive down the price of the home to

salvage value. That concern is identical whether the owner remains, subleases, or sells.

The right to occupy land permanently is indeed something that California law gives to mobilehome owners and that must be given if mobilehome value is to be protected at all. For where there is nowhere to move such homes, an order to move is effectively an order to turn the home over to the park owner at its salvage value. The right to occupy land at less than the rent the park owner chooses to charge is equally necessary to protect against the park owner's capacity either to appropriate the home for himself or to charge rents that render the mobilehome worthless. The right granted the mobilehome owner to "market" the right of occupancy is simply a grant to the homeowner of the right to alienate his property.

Insofar as these rights are, in part at least, rights that ordinary tenants do not have, the answer is that mobilehome owners are not ordinary tenants. They are coproprietors. To characterize them merely as tenants is not only to slight the authority of the State to give definition to property rights under novel circumstances, it is to give no constitutional weight to the needs of a homeowner whose home is sited on the land of another as a matter of economic necessity.

B. The Crucial Element in *Loretto* Was the Absence of a Voluntary Opening of the Property to Possessory Use by Others.

Nothing in *Loretto* or any other physical invasion case compels or even suggests the result urged on this Court by petitioners and their supporters. The crucial distinction between this case and *Loretto* is the presence here of a voluntary act on the part of the park owner opening his property to the possession of others. That act may come in the form of property that has been opened to the general public, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, or property that is occupied under a contractual

relationship between the landowner and the persons on whose behalf the challenged law has been invoked. *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

Where there is no such voluntary act, a landowner is entitled to be left to the exclusive possession, peace and quiet, and privacy that is a central element of a property right.[61] *United States v. Causby*, 328 U.S. 256; *Nollan v. California Coastal Commission*, 483 U.S. 825. Where a landowner has opened private land only to those who pay (who have a contractual relationship with him), the state cannot compel him to convert it to a public facility, opening it also to those who do not pay. *Kaiser Aetna v. United States*, 444 U.S. 164. *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381 (1976). But a property owner who has entered into a contractual relationship with another to possess his land cannot claim the right to dictate the terms of that relationship free of all government regulation, and subject only to the bargained-upon terms that unconstrained bargaining would produce between the parties. Such a result would constitute a throwback to the discredited doctrine of freedom of contract articulated in *Coppage v. Kansas*, 236 U.S. 1 (1915) and *Adkins v. Children's Hospital*, 267 U.S. 525 (1923).

Any extension of *Loretto* to invalidate regulation of contractual possessory relationships would make all sorts of conventional regulation constitutionally suspect as takings. Even if a rule were limited to some notion of a "marketable" possessory right it would be very far-reaching. Laws recognizing rights to sublease or to assign

[61] Unlike *Loretto*, where the owner had not consented to the invasion of his property by the Teleprompter cable, here the only physical objects on the park owner's property are mobilehomes to which the park owner has no objection. Indeed it is in consequence of such "invasions" that he makes his living.

a lease would be vulnerable as takings, since such rights compel the landowner to accept an imposed new tenant at a set price. In fact, unreasonable withholding of permission to sublease can be an illegal restraint on alienation.[62] This is the sort of prospect the Court recognized when in *F.C.C. v. Florida Power Corp.*, 480 U.S. at 252, it drew a distinction between voluntarily initiated "invitations" and those that are imposed by government. "[I]t is the invitation . . . that makes the difference."

CONCLUSION

There are no factual disputes in this case which merit a trial. Amici do not disagree with the economic theory that motivates petitioners' action: mobilehome prices and rents are complementary. The fact that mobilehome prices increase when rents are controlled, however, does not deprive park owners of any constitutionally protected interest. Moreover, it is precisely this relationship that makes controlling rents a rational response to the need to protect mobilehome owners' equity investment in their homes.

Because most mobilehomes in reality must be occupied on the land of another, the formulaic rule urged by the petitioners—no sale of the right to occupy the land of another—would deny mobilehome owners any claim to their property rights. Neither *Loretto* nor any other case decided by this Court calls for such an outcome. Even accepting every allegation in petitioners' complaint as true, the Escondido Ordinance does not violate any of petitioners' constitutional rights.

For all of the reasons stated herein, amici respectfully request that this Court affirm the decision of the California Court of Appeal.

[62] New York Real Prop. Law, § 226-b (West 1989 & Supp. 1991); Restatement (Second) of Property, § 15.2(2) (1977 & Supp. 1991).

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Supreme Court of the United States
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Respondent.

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BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the City of Escondido's Mobile Home Rent Protection Ordinance violates the Takings Clause.
2. Whether the City of Escondido's Mobile Home Rent Protection Ordinance violates the Due Process Clause.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members have a strong interest in legal issues that affect the powers and responsibilities of state and local governments.

This case presents questions concerning the constitutionality of a municipal mobile home rent control ordinance. At stake is the authority of States and local governments to regulate the economic relations of landlords and tenants and, beyond that, to engage in a wide range of economic regulation pursuant to the police power. *Amici* believe that the court below correctly decided that the Escondido ordinance does not require compensation under the Takings Clause. A contrary holding would be irreconcilable with more than a century of this Court's takings decisions. *Amici* accordingly submit this brief to assist the Court in its resolution of the case.[1]

SUMMARY OF ARGUMENT

1. This Court's takings decisions of the past century establish a clear dichotomy between permanent physical occupation of property and economic regulation. While permanent physical occupation has been held to be a *per se* taking, regulation seldom results in a taking. The distinction between permanent physical occupation and economic regulation is essential to the ability of state and local governments to enact regulatory measures pursuant to the police power.

Obliterating this dichotomy, as Petitioners urge, would substantially impede the efforts of States and local governments to further the public interest through regulation. Petitioners' argument is without merit, however. There is no basis in law or fact for applying the permanent physical occupation doctrine to Escondido's rent control ordinance.

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

2. The Escondido ordinance does not deprive Petitioners of due process of law. The ordinance survives due process scrutiny because the voters of Escondido rationally could have believed that this rent control law would foster its objective of remedying inequitable market conditions arising from the scarcity of mobile home spaces in Escondido. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984). Indeed, the ordinance substantially advances its objective in three ways: 1) it controls rents for mobile home pads; 2) it eases the effects of a recognized shortage of affordable housing; and 3) it protects the value of mobile homes.

ARGUMENT

I. THE TAKINGS ANALYSIS URGED BY PETITIONERS WOULD ERADICATE A FUNDAMENTAL DISTINCTION BETWEEN REGULATION AND PERMANENT PHYSICAL OCCUPATION THAT MUST BE PRESERVED TO ENABLE STATE AND LOCAL GOVERNMENTS TO REGULATE IN AREAS OF LEGITIMATE CONCERN

Fundamental to this Court's jurisprudence under the Takings Clause is a distinction between the economic effect of governmental regulation and takings involving the permanent physical occupation of property. Adhering strictly to this distinction, the Court has held that permanent physical occupation is a *per se* taking. Regulation, on the other hand, is evaluated under a multifactor analysis that allows the government broad leeway to adopt measures that promote the public welfare.

Petitioners' primary argument is that the Escondido ordinance regulating rents in mobile home parks requires compensation because it is a permanent physical occupation of their property. Petitioners' ap-

proach to the takings issue obliterates the essential and long-standing distinction between permanent physical occupation and regulation. The Court has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Only "when the physical intrusion reaches the extreme form of a permanent physical occupation" has a *per se* taking occurred. *Id.*

The narrowness of the permanent physical occupation doctrine has repeatedly been made clear. Over a century ago in *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 181 (1872), the Court found that permanent flooding of land constituted a taking where the flooding accomplished an actual, permanent physical occupation of the plaintiff's property "so as to effectually destroy or impair its usefulness." Where the government seized and directed operation of a coal mine during wartime, the Court held that such conduct amounted to a taking that required compensation. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). The Court reasoned that because there had been an "actual taking of possession and control," *id.* at 116, the seizure made the mines government facilities "'in as complete a sense as if the Government held full title and ownership.'" *Id.* (quoting *United States v. United Mine Workers*, 330 U.S. 258, 284 (1947)).[2]

[2] In *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), on the other hand, the Court found no taking even though the government had ordered mine owners to cease operations. "The Court concluded that the temporary though severe restriction on *use* of the mines was justified by the exigency of war." *Loretto*, 458 U.S. at 432. In dissent, Justice Harlan noted that "as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession of these mines by the United States." *Central Eureka Mining*, 357 U.S. at 181 (Harlan, J., dissenting). Nevertheless, the Court maintained the fundamental dichotomy between physical occupation and regulation by noting that, in contrast to *Pewee Coal*, "the Government did not occupy, use, or in any manner take physical possession" of the mines or mining equipment. *Id.* at 165-66.

More recently, in *Loretto* the Court summarized and applied the law articulated in earlier cases. It stated that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Id.* at 427. The Court also made clear the draconian manner in which this doctrine operates. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* In contrast to asserted regulatory takings, therefore, the government has no opportunity to justify its action by showing that its diminution of private property interests serves an overriding public need. *See* 2 J. Sackman, *Nichols' Law of Eminent Domain* § 6.05, at 6-36 (rev. 3d ed. 1990).

This Court has emphasized that the permanent physical occupation doctrine "is very narrow." *Loretto*, 458 U.S. at 441. As reiterated in *Loretto*, the prerequisite for application of the doctrine is that "the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property." *Id.* at 436; *see also id.* at 435 (permanent physical occupation "chops through the bundle" of private property rights, "taking a slice of every strand"); *Key-*

stone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting) ("Physical appropriation by the government leaves no doubt that it has in fact deprived the owner of all uses of the land."). The Court has cautioned that permanent physical occupation analysis is not to be extended "beyond the scope to which it legitimately applies." *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 (1987).[3]

Absent a permanent physical occupation, the Court's approach to takings claims is markedly different. Where an interference with property rights "arises from some public program adjusting the benefits and

[3] Indeed, as *Loretto* recognized, not even "every physical *invasion* is a taking." 458 U.S. at 435 n.12. "[A] physical invasion is subject to a balancing process," for example, even though "a permanent physical occupation" is not. *Id.* at 432. "The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude." *Id.* at 435 n.12.

This Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), "underscores the constitutional distinction between a permanent occupation and temporary physical invasion." *Loretto*, 458 U.S. at 434. In *PruneYard* the Court characterized "the right to exclude others" as "essential" and noted that "there has literally been a 'taking' of that right to the extent that the [state supreme court] has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on [private] shopping center property." 447 U.S. at 82. The Court did not find an actual taking, however, even though certain persons "may have 'physically invaded' [the owner's] property." *Id.* at 84. The Court emphasized the owner's acquiescence in the "invasion": the general public had been invited to the shopping center, *id.* at 76, and "the owner had not exhibited an interest in excluding all persons from his property." *Loretto*, 458 U.S. at 434.

burdens of economic life to promote the common good," a balancing of public and private interests is undertaken and a taking is far less likely to be found. *Keystone Bituminous Coal*, 480 U.S. at 488 n.18. As the Court observed in *Andrus v. Allard*, 444 U.S. 51 (1979):

> [G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law."

Id. at 65 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

"[T]his Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986). Indeed, regulation may substantially diminish the value of property without taking it. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (ordinance prohibiting excavation below certain level did not constitute taking of land used for sand and gravel mining); *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365 (1926) (zoning regulation resulting in 75 percent reduction in property value not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (ordinance prohibiting

manufacture of brick did not constitute taking although it reduced value of land to less than one-tenth its prior value).

The Constitution does not mandate compensation for the economic impact of governmental regulation upon private property. In contrast to the Court's *per se* approach to permanent physical occupation, only if "regulation goes too far will it be recognized as a taking." *Pennsylvania Coal Co.*, 260 U.S. at 415. In implementing this flexible standard, the Court has developed a "multifactor inquiry generally applicable to nonpossessory governmental activity." *Loretto*, 458 U.S. at 440.

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Penn Central, 438 U.S. at 124. Even with the development of these "formulas and factors," *Andrus*, 444 U.S. at 65, "[r]esolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic." *Id.*

The Court's regulatory taking analysis accommodates the need of state and local governments to adopt regulatory measures to promote the common welfare. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987) ("[A] broad range of governmental purposes and regulations satisfies these [takings clause] requirements."); *Penn Central*, 438 U.S. at 125 (regulatory " 'taking' challenges have . . . been held to be without merit in a wide variety of situations"); *see also Keystone Bituminous Coal*, 480

U.S. at 493 (under regulatory takings analysis, person alleging unconstitutional taking bears "heavy burden"). Using this approach, the Court has declined to impose compensatory obligations in connection with traditional governmental regulatory programs. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980) (zoning laws); *Hadacheck*, *supra* (regulation of a specific industrial activity within a designated area); *Goldblatt*, *supra* (same).

Following this Court's strict delineation of the dichotomy between regulation and permanent physical occupation, the lower courts have repeatedly rejected attempts to characterize economic regulation as permanent physical occupation.[4] As these cases indicate, a wide range of essential government regulation will be jeopardized if the Court does not categorically reject Petitioners' expansive reading of the permanent physical occupation doctrine. *Cf. Loretto*, 458 U.S. at 451 (Blackmun, J., dissenting) ("I do not relish the prospect of distinguishing the inevitable flow of cer-

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[4] *See, e.g., Commercial Builders v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (fee imposed on development project to increase availability of low-income housing not analogous to physical taking of property that automatically requires compensation); *Gilbert v. City of Cambridge*, 923 F.2d 51, 59 (1st Cir.) (ordinance limiting conversion of rent-controlled apartments to condominiums not permanent physical occupation), *cert. denied*, 112 S. Ct. 192 (1991); *Calvert Invs., Inc. v. Louisville & Jefferson County Metro. Sewer Dist.*, 847 F.2d 304, 308-09 (6th Cir. 1988) (sewer district's tapping into private company's sewer main not permanent physical occupation); *Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47, 49 (D.C. Cir. 1985) (ordinance prohibiting hotel from excluding licensed taxi driver from using hotel's taxi stand did not effect permanent physical occupation).

tiorari petitions attempting to shoehorn insubstantial takings claims into today's 'set formula.' ").

In cases like this one, involving the landlord-tenant relationship, the Court has applied a regulatory takings analysis and "has consistently affirmed that States have broad power to regulate . . . without paying compensation for all economic injuries that such regulation entails." *Loretto*, 458 U.S. at 440; *see also Florida Power Corp.*, 480 U.S. at 252 ("[S]tatutes regulating the economic relations of landlords and tenants are not *per se* takings."). Among the governmental measures the Court has upheld are regulations controlling rents. *See, e.g., Bowles v. Willingham*, 321 U.S. 503 (1944); *Block v. Hirsh*, 256 U.S. 135, 155 (1921) (police power allows landlord's property rights to be "cut down, and to that extent taken, without pay"). *See also Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) (dismissing challenge to rent control ordinance for want of substantial federal question). There is no basis for Petitioners' argument that the Court should depart from this well-settled mode of analysis to treat the Escondido ordinance, a paradigmatic rent control law, as a permanent physical occupation of property.[5]

[5] Petitioners' primary takings argument is founded on their view that *Loretto* expanded the concept of permanent physical occupation to include particular rights generally associated with ownership. *See* Pet. Br. 10. *Loretto* did nothing of the sort. The defendants in *Loretto* had physically occupied—permanently—a small but definite portion of plaintiff's land. *Loretto*, 458 U.S. at 422; *see also id.* at 438 & n.16. *Loretto* merely applied "[t]he historical" or "traditional rule" of permanent physical occupation. *Id.* at 435-36. It held that a "minor but permanent" physical occupation constitutes a taking *per se*, without regard to "minimal economic impact on the owner" or "the volume of space it occupies." *Id.* at 435, 438 n.16.

The Escondido ordinance is simple—it regulates rent increases. Such economic regulation may result in a transfer of money but it has nothing to do with actual, permanent physical occupation. *See United States v. Sperry Corp.*, 110 S.Ct. 387, 395 n.9 (1989) (reversing as "an extravagant extension of *Loretto*" the holding of the court of appeals that "deductions of a percentage of a monetary award" are "physical appropriations of property").

Neither does the California mobile home law, which limits parkowners' discretion to evict homeowners or to refuse to rent to prospective purchasers of mobile homes, effect a permanent physical occupation under *Loretto*. As respondent City of Escondido demonstrates in its brief, the "element of required acquiescence" that is "at the heart" of the physical occupation doctrine is entirely absent from the California statute. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987); *Azul Pacifico, Inc. v. City of Los Angeles*, 1991 WL 224528 (9th Cir. Nov. 1, 1991) (Kozinski, J.) (acknowledging constitutionality of California mobile home law); *Eamiello v. Liberty Mobile Home Sales*, 546 A.2d 805, 816-18 (Conn. 1988) (holding that a Connecticut statute similar in effect to the California law "is not sufficiently analogous to a physical occupation of property to violate the takings clause"), *appeal dismissed*, 489 U.S. 1002 (1989).

Standing alone neither the Escondido ordinance nor the California mobile home statute effects an actual, permanent physical occupation. Taken together they

do not do so, either. While their combined effect may be to confer upon incumbent tenants the increased value of mobile homes situated on rent controlled plots, such a transfer of value cannot by any stretch of the applicable doctrine be characterized as a permanent physical occupation. Petitioners, in short, advance precisely the kind of "extravagant extension of *Loretto*" summarily rejected by the Court in *United States v. Sperry, supra.*

II. THE ESCONDIDO ORDINANCE DOES NOT DEPRIVE PETITIONERS OF DUE PROCESS OF LAW BECAUSE ESCONDIDO RATIONALLY COULD HAVE BELIEVED THAT THE ORDINANCE PROMOTES ITS LEGITIMATE OBJECTIVE OF REMEDYING INEQUITIES ARISING FROM THE SCARCITY OF MOBILE HOME SPACES

Petitioners assert that the Escondido ordinance deprives them of their property without due process of law. This argument is patently meritless.[6] The ordinance easily satisfies the requirements of due process because the voters of Escondido rationally could have believed that the rent control ordinance would promote its objective of remedying inequitable market conditions arising from the scarcity of mobile home spaces in the city. Indeed, the ordinance substantially advances that objective by: 1) lowering and stabilizing rents for mobile home pads; 2) ameliorating the effects of an acute shortage of affordable housing; and 3) safeguarding the value of mobile homes.[7]

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[6] A careful reading of Petitioners' brief (at 30-36) indicates that Petitioners have as much as conceded their due process argument.

[7] Respondent City of Escondido demonstrates in its brief that the ordinance not only satisfies the relaxed criteria of

To establish that the Escondido ordinance denies them substantive due process, Petitioners must do more than debate the efficacy of the ordinance:

> Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective.

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 242 (1984) (quoting *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)). "When the legislature's purpose is legitimate and its means are not irrational, . . . empirical debates over the wisdom of . . . socioeconomic legislation . . . are not to be carried out in the federal courts," *id.* at 242-43; as long as the measure's rationality "is at least debatable," its constitutionality is assured. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 470 n.12 (1981) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)). The Escondido ordinance easily meets this test.[8]

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constitutionality under the due process clause, but also " 'substantially advance[s] legitimate state interests' " without " 'den[ying] an owner economically viable use of his land.' " *Nollan*, 483 U.S. at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. at 260). *Amici* submit that if the ordinance satisfies the heightened scrutiny of *Nollan*, it necessarily satisfies the rational basis scrutiny of substantive due process analysis.

[8] Laws passed by voter initiative are entitled to no less deference than comparable measures enacted by a legislature. *See City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 676-77 (1976).

Petitioners do not "challenge rent controls generally," Pet. Br. 7, and concede that "the courts grant great deference to legislative decisions regarding economic matters in general and rent control in particular," *id.* at 31 (citing *Pennell v. City of San Jose*, 485 U.S. 1 (1988)). Indeed, just three years ago in *Pennell* the Court reaffirmed the States' " 'broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails' " and "s[aw] no need to reconsider the constitutionality of rent control *per se*." 485 U.S. at 12 n.6 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 440). *Pennell* summarily rejected a substantive due process challenge to a rent control ordinance. *See id.* at 13-14 & n.8.

Even in an era when freedom of contract frequently stood as an obstacle to economic regulation, *see, e.g., Lochner v. New York*, 198 U.S. 45 (1905), a majority of the Court subscribed to Justice Holmes's opinion that "if, to answer one need, the legislature may limit height, to answer another it may limit rent." *Block v. Hirsh*, 256 U.S. 135, 156 (1921). Foreshadowing present-day due process doctrine, the Court declared:

> Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern, of course, with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world is futile, or has no reasonable relation to the relief sought.

Id. at 158. The Court has since repeatedly upheld rent control laws. *See Pennell, supra; Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

Given six Supreme Court decisions in rent control's favor (as well as the concurrence of "most of the civilized countries of the world," *Block v. Hirsh*, 256 U.S. at 155), Petitioners do not dispute the legitimacy of the interest that the ordinance seeks to advance. Pet. Br. 34. *See Pennell*, 485 U.S. at 12.[9] Petitioners argue, however, that the voters' failure to provide for "vacancy decontrol"—for the negotiation of rents up to market levels at the termination of each tenancy—robs the ordinance of all rationality.[10] Petitioners are in error. The ordinance substantially advances the City's goal of regulating the unique and potentially problematic relationship between the owners of mobile homes and the owners of the land on which those homes sit.

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[9] Appellants in *Pennell* "[did] not dispute that the [San Jose] Ordinance's asserted purpose of 'prevent[ing] excessive and unreasonable rent increases' caused by the 'growing shortage of and increasing demand for housing in the City of San Jose' . . . is a legitimate exercise of [the City's] police powers." 485 U.S. at 12 (citing *Block v. Hirsh*, 256 U.S. at 156).

[10] This feature of the ordinance is not novel. *See Woods v. Cloyd W. Miller Co.*, 333 U.S. at 139 n.1. (declining to invalidate legislation that placed a 15% ceiling on rent increases between tenancies, even though adjustments of 40-60% apparently would have been necessary to bring the rents at issue into line with the prevailing market).

A. Escondido Rationally Could Have Believed That the Ordinance Would Result in Lower and More Stable Rents for Mobile Home Pads

It is beyond dispute that the Escondido ordinance moderates and stabilizes rents for residents whose mobile homes were in place at the time of the ordinance's passage, and that the voters had a legitimate interest in bringing this outcome about. *See, e.g., Pennell*, 485 U.S. at 13. But Petitioners complain that the ordinance "does nothing to ameliorate housing costs for incoming tenants." Pet. Br. 33. This argument recalls Justice McKenna's contention that a rent control ordinance could not conceivably be justified as a means of combatting homelessness, because "[i]f the statute keeps a tenant in, it keeps a tenant out." *Block v. Hirsh*, 256 U.S. at 161 (McKenna, J., dissenting).

Justice McKenna's assertion and Petitioners' challenge to the Escondido ordinance share two fatal flaws. First, the probable effects of regulation are a matter committed to the judgment of the legislature; social policy is ordinarily determined by legislative debate rather than judicial decision. *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. at 242; *Block v. Hirsh*, 256 U.S. at 158. As Judge Kozinski recently observed:

> Although it may be true that [vacancy control] in some cases takes money from the landlord and puts it into the pocket of a tenant who no longer resides at the park, the City Council could reasonably believe that in the majority of cases the ordinance serves the valid public purpose of keeping mobile home rent from becoming prohibitively high. How well the ordinance serves this purpose is a legislative question, one the court will not consider.

Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, 958 (9th Cir. 1991) (citing *Pennell*, 485 U.S. at 13).

Second, even if Petitioners' claim that the ordinance fails to aid incoming tenants were correct—and insofar as rent controls enable all tenants to predict and budget for future obligations with some degree of certainty, it is plainly incorrect—there exists no doctrine of constitutional law that requires the voters of Escondido to "strike at all evils at the same time or in the same way." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466 (quoting *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935)); *see also Woods v. Cloyd W. Miller Co.*, 333 U.S. at 145 (legislature "need not control all rents or none"). If Escondido someday concludes that in practice the ordinance unduly advantages incumbent tenants at the expense of incoming tenants, it may well be appropriate for the City to adjust the ordinance so that its protections are more evenly spread among future generations of tenants. The point is that Escondido is constitutionally permitted to leave such fine-tuning for another day.

B. Escondido Rationally Could Have Believed That the Ordinance Would Ameliorate the Effects of an Acute Shortage of Low-Cost Housing

Petitioners also argue that the Escondido ordinance does nothing to alleviate the scarcity of low-cost housing in that community.[11] The focus of the ordinance

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[11] In *Azul Pacifico, Inc. v. City of Los Angeles*, 1991 WL 224528 (9th Cir. Nov. 1, 1991), the Ninth Circuit appeared to advocate migration from high-rent areas of California to

on the *effects* of scarcity, however, is entirely valid. As the Court noted in *Pennell*, "the Government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly, or a discrepancy between supply and demand in the market for a certain product." 485 U.S. at 11-12 (citations omitted); *see also Woods v. Cloyd W. Miller Co.*, 333 U.S. at 143 (legislature may legitimately aim to "control the forces that a short supply of the needed article created").

Moreover, as Petitioners acknowledge, the problem of housing scarcity has recently been addressed by a California statute that exempts new mobile home parks from rent control. *See* Pet. Br. 27 n.10 (citing Cal. Civ. Code §§ 798.7, 798.45 (West 1991)). Coupling rent control with such incentives for the creation of additional housing is well within the realm of rational legislative choice. *See Edgar A. Levy Leasing Co.*, 258 U.S. at 243-46 (law permitting continued tenancy at judicially set rents and affording tax breaks for new construction was rational response to

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low-rent areas when it took judicial notice of the millions of dwelling places in the state and proclaimed that "[i]f the price of housing in Los Angeles is high, this is simply the free market's mechanism for ensuring efficient allocation of existing housing resources." *Id.* at *34. An essential premise of the police power, however, is that the laws of economics are not the laws of the land. *See Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) ("Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."); *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) ("[A] Constitution is not intended to embody a particular economic theory. . . . "). Cities are not constitutionally required to stand by while market forces drive all but the richest residents out of town.

housing shortage); *Marcus Brown Holding Co.*, 256 U.S. at 198-99 (law exempting "buildings now in course of erection" from moratorium on eviction of tenants was "too obviously justified to need explanation").

C. Escondido Rationally Could Have Believed That the Ordinance Would Protect Mobile Home Owners By Safeguarding the Value of Their Homes

Finally, Petitioners allege that the ordinance permits incumbent tenants to sell their mobile homes at a premium that Petitioners themselves would otherwise pocket. If this is indeed the effect of the ordinance, it is fully justified by the unique potential for exploitation inherent in the relationship between the owner of a mobile home and the owner of the land to which the mobile home is anchored.

"[M]obile homes themselves really aren't: Moving a coach is a substantial and expensive undertaking." *Azul Pacifico*, 1991 WL 224528 at *23.[12] Tenants of mobile home parks own virtually permanent structures that rest on land belonging to someone else.

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[12] *See also Azul Pacifico, Inc. v. City of Los Angeles*, 740 F. Supp. 772, 774 n.1 (C.D. Cal. 1990) (noting that only 3% of California coaches have been moved from the site of their first installation), *aff'd in relevant part*, 1991 WL 224528 (9th Cir. Nov. 1, 1991); *Casella v. City of Morgan Hill*, 280 Cal. Rptr. 876, 877 n.1 (Cal. App. 1991) (reciting city council's findings that "[r]emoval and or relocation of a mobile home from a park space . . . can only be accomplished at substantial cost, and in many instances may cause extensive damage to the mobile home and loss of appurtenances such as integrated landscaping and supporting structures inconsistent with the new location"), *review denied*, 1991 Cal. LEXIS 3294 (Cal. July 17, 1991), *petition for cert. filed*, 60 U.S.L.W. 3322 (U.S. Oct. 15, 1991) (No. 91-631).

This situation, as the Court has previously recognized, has many "evils associated with it [and thus] is a classic [candidate for] exercise of a State's police powers," *Hawaii Housing Auth. v. Midkiff*, 467 U.S. at 242; in the absence of regulation, owners of mobile home parks enjoy "an economically dominant position" with respect to their tenants, *see Eamiello v. Liberty Mobile Home Sales*, 546 A.2d 805, 818-19 (1988), *appeal dismissed*, 489 U.S. 1002 (1989).[13]

The price of a used mobile home depends heavily on the rents charged for the pad that it occupies. *See, e.g., Azul Pacifico*, 740 F. Supp. at 776. In *Azul Pacifico*, the Ninth Circuit held that a vacancy control provision in an ordinance similar to Escondido's not only was rationally related to a legitimate state interest, but indeed substantially promoted that interest, because otherwise park owners would set rents for prospective tenants so high that no one would buy the incumbent tenants' coaches. *See* 1991 WL 224528 at *37 (citing *Nollan*, 483 U.S. at 837).

Petitioners deem this scenario implausible because, they contend, no rational park owner would forgo the opportunity to acquire new tenants at decontrolled rents. *See* Pet. Br. 29, 33. Escondido rationally could have considered it likely, however, that absent restraint, park owners will raise rents, perhaps not so high as to scare new tenants away, but high enough to prevent new tenants from making fair offers on the mobile home coaches. In other words,

[13] In *Midkiff* a "land oligopoly" was found by the Legislature to have "forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes." 467 U.S. at 242.

park owners not constrained by vacancy control have the power to appropriate, through inflated rental rates, a substantial portion of the value of departing tenants' homes. Park owners can exercise this power whenever an incumbent tenant is compelled by normal familial and economic pressures to leave the park,[14] and as long as the value of the mobile home that the park owner seeks to capture is less than the cost of uprooting the home and moving it out of the park. Given that "[t]he cost of moving a mobile home can range from three to ten thousand dollars," and that the intrinsic value of the home is often less than that sum, *Azul Pacifico*, 740 F. Supp. at 774, 779, Escondido voters could rationally conclude that action had to be taken "to protect the substantial investments of tenants," *id.* at 780. The ordinance substantially advances this objective by divesting park owners of unfettered discretion to set rents for incoming tenants.

While the ordinance may thereby result in a transfer of wealth from park owners to tenants, the voters of Escondido could constitutionally choose to protect and enhance one form of property ownership at the expense of another. "Indeed, a primary purpose of rent control is the protection of tenants." *Pennell*, 485 U.S. at 13; *cf. Block v. Hirsh*, 256 U.S. at 157 ("The preference given to the tenant in possession is an almost necessary incident of the policy, and is traditional in English law."). "When excessive rents are forbidden, . . . tenants as a class (or at least

[14] *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1279 (9th Cir. 1986) (tenants are not "immune to the normal familial and economic pressures that occasion vacancies even in rent controlled housing"), *cert. denied*, 485 U.S. 940 (1988).

incumbent tenants as a class) become richer." *Pennell*, 485 U.S. at 22 (Scalia, J., dissenting in part).

The Court analyzed a similar situation more than 60 years ago and resoundingly rejected the constitutional objections:

> [T]he state was under the necessity of making a choice between the preservation of one class of property and that of another . . . . It would have been none the less a choice if, instead of enacting the present statute, the state [had done nothing]. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. . . . And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

Miller v. Schoene, 276 U.S. 272, 279-80 (1928). "In choosing the tenant rather than the mobile home park operator as the recipient of th[e] economic advantage arising from the near-monopoly status of the industry", the Escondido ordinance, "by allocating its benefit to those who generally are more in need, has not violated any constitutional principle." *Famiello v. Liberty Mobile Home Sales*, 546 A.2d at 820.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

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In the Supreme Court of the United States

October Term, 1991

JOHN K. YEE, et al.,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF THE CITY OF SANTA MONICA, COUNTY OF SANTA BARBARA AND THE SANTA MONICA RENT CONTROL BOARD IN SUPPORT OF RESPONDENT

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Pursuant to Supreme Court Rule No. 37.5, and with the permission of the parties, the City of Santa Monica, the County of Santa Barbara, and the Santa Monica Rent Control Board, respectfully submit this brief amicus curiae in support of the City of Escondido.

INTEREST OF AMICI

Amici support the City of Escondido in urging affirmance of the California Court of Appeal, and join in the policy concerns expressed in the City of San Jose and Local Government Association briefs. Amici write separately to stress vital aspects of the law of possessory takings, particularly as they apply to the unique factual setting of this case.

Amici have enacted rent control and other land use laws as a result of rapidly rising rents, a severe housing shortage, and a desire to protect elderly and low and moderate income tenants from homelessness. These mea-

sures are particularly necessary in southern California which suffers from a crisis in the affordable housing market. Amici's efforts are consistent with the long recognized duty of governments to provide for the housing needs of all segments of their communities.

Amici must also respond to a wide variety of difficult and often hotly contested land use issues. Long observed standards of takings jurisprudence, which petitioners would jettison, have provided the necessary flexibility for local governments to balance these competing interests. Accordingly, amici urge the continued vitality of these principles in a ever more complicated society.

SUMMARY OF ARGUMENT

The Escondido mobilehome rent control ordinance ("Ordinance") is an unexceptional form of price control. While it may affect the value of regulated property, it neither denies economically viable use nor imposes an unwanted use on property. Therefore, it is neither a "regulatory" nor "possessory" taking. That tenants occupy land and pay fair rent—precisely the owner's intended use—does not transform their tenancies into physical invasions. The property rights theory conceived in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), which is the basis for petitioners' cause of action, is contrary to well-established takings doctrine.

Escondido has imposed rent control on mobilehome spaces. It has neither compelled a particular use, nor secured any form of possessory rights to tenants. Tenure flows from the state Mobilehome Residency Law ("MRL"), whose validity is only indirectly before the Court, insofar as petitioners neither sought relief from the MRL, nor sued the state. Nonetheless, amici agree with petitioners that the Ordinance must be considered against the backdrop of the

MRL, which predated the Ordinance's adoption and defined the contours of petitioners' property rights. Viewed in context, the incremental effect of the Ordinance is de minimus on these rights or petitioners' expectations. Moreover, it is a regulatory effect. In an attempt to overcome regulatory takings law, petitioners struggle to portray the Ordinance as an interference with possessory rights. Yet, it neither transfers, abrogates, nor affects any possessory interest.

The Ordinance regulates rent increases. Thus, it tempers the effects of inflation, monopoly, and other market shortcomings on housing costs, which distort appreciation in land values. As described by petitioners, the combined effect of the Ordinance and MRL is to permit tenants to "monetize" some of the appreciated value. Regardless of the truth of petitioners' claim, the constitution does not mandate that fee owners receive maximum appreciation. The state, which defines property in the first instance, has reposed ancillary value in tenants, rather than landlords. The Fifth Amendment is indifferent to this distribution of economic benefit, particularly where the state, through other reciprocal land use regulations, has created substantial appreciated value in the first place.

Even if future appreciation constitutes Fifth Amendment property, it is neither discrete nor severable. Cases holding that extinction of discrete property interests is a taking are inapposite. Rather, the denial of appreciated value must be considered in relation to the remainder of petitioners' property rights. Moreover, even if the Ordinance caused a taking, it occurred at the inception of the law, prior to the appreciation. At that time, it was fully compensated through the provision of fair rents. Value occurring and realized by tenants subsequent to the taking is not compensable.

INTRODUCTION

Seventy years ago, this Court sustained stringent rent and eviction controls against Fifth and Fourteenth Amendment claims. In *Block v. Hirsch*, 254 U.S. 135 (1921), Justice Holmes assumed the District of Columbia Rents Act would "deprive [the landlord] of the power of profiting" from scarce housing resources, "a right usually incident to fortunately situated property." *Id.* at 157. Nonetheless, the Court held that the controls went "little if at all farther" than other forms of economic regulation. *Id.*

> The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. *Id.* at 155.

To Justice Holmes, protecting tenants from landlord profiteering was not only a proper public purpose, it was one pursued "by most of the civilized nations of the world." *Id.* at 155.[1] Indeed, "[t]he preference given to the tenant in

[1] The Court of that era drew a sharp distinction between matters affecting the public interest and those only of private concern. The distinction is traced to Lord Chief Justice Hale of England, whose eighteenth century treatise stated that "when private property is affected with a public interest" it "ceases to be *juris privati* only." *De Portibus Maris*, 1 F. Hargrave Law Tracts 78 (1787). This Court adopted this principle in *Munn v. Illinois*, 94 U.S. 113 (1877), declaring that "when private property is devoted to a public use, it is subject to

(continued...)

possession is an almost necessary incident of the policy, and is traditional in English law." *Id.* at 157.

Block is noteworthy, not only for its strong endorsement of tenant protection laws, but because it came at a time when the Court was strictly scrutinizing other forms of land use regulation. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Indeed, *Block* preceded the Court's acceptance of zoning as a permissible form of land use control. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Nor was *Block* an anomaly. Since 1921, this Court has upheld rent and eviction controls on at least six other occasions.[2]

Understandably then, petitioners do not challenge the validity of rent control per se.[3] Indeed, given this Court's recent pronouncements, any such effort would appear to be futile. Nor do they directly challenge mobilehome owners' statutory right to sell their homes in situ, or the owners' protection from arbitrary eviction. For, if this had been the gravamen of their injury, petitioners would have sued the state to enjoin the MRL.[4] They did not,[5] and could not

[1](...continued)
public regulation." *Id.* at 130. The decision in *Block* reaffirms this, and notes that with rental housing, "[a]ll the elements of a public interest justifying some degree of public control are present." 254 U.S. at 156.

[2] *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); and *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

[3] See Petitioners' Brief ("Pet. Br.") at 7.

[4] Cal. Civ. Code § 798, et seq. (Stats 1978, chapts.1031-1035)

[5] Petitioners attempt to fudge the issue of whether their attack is aimed at the Escondido Ordinance, the MRL, or both, by claiming that the Ordinance "either standing alone or in combination with the [MRL]" effectuates the taking. Pet.

(continued...)

because such an action was time barred.[6] Thus, to the extent petitioners are aggrieved by the transfer of possessory interests occasioned by the MRL, the instant case is the wrong vehicle in which to pursue the issue.[7]

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[5](...continued)
Br. at 9, 14. But once they begin to define the actual property interest involved, it is apparent that they have sued the wrong party. Indeed, each of the five "valuable possessory interest[s]" claimed in this case are attributable to the MRL. *See id.* at 6, 9-10 ("the rights to: (1) occupy a mobilehome space in perpetuity, (2) pay below market rent in perpetuity, (3) select the next tenant to occupy the space, (4) fix the successor tenant's effective rent by charging a premium on the sale of the mobilehome coach, and (5) sell, bequeath or pass by intestacy all of these rights"). The only element of this list attributable to Escondido is the below market rents. Notably, however, petitioners do not separately challenge this, but complain that state law makes the feature 2"perpetual." As the court below noted,

> park tenants' . . . rights to 'permanently occupy' the landlord's property . . . derive not from a rent control ordinance but from the state Mobilehome Residency Law which limits the circumstances under which a landlord may terminate a tenancy, imposing a 'good cause' standard. Cert. Pet. at A-18-19.

[6] Petitioners' complaint was filed more than a decade after the MRL was enacted, and thus is beyond the statute of limitations. *See Azul Pacifico v. City of Los Angeles*, __ F.2d__, 60 U.S.L.W. 2321, (9th Cir. 1991) (slip op. at 21); *De Anza Properties v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1990).

[7] It may be possible for two or more laws to combine to effectuate a taking, where neither standing alone would be objectionable. But that case is not before the Court. Since the MRL has not been challenged, it is the incremental effect of the Ordinance that must be analyzed. Any other approach would be tantamount to passing judgment on the MRL, something the Court should not do because petitioners have chosen not to sue the State of California nor seek relief against the state Act.

It is highly unusual for this Court to consider a takings clause challenge to a state law where the state is not present to defend it. *See Mahon*, nominally a suit between private parties, but "treated as one in which the general validity of the [Kohler Act] should be discussed." 260 U.S. at 393. In order to do this, however, "[t]he Attorney General of the State [was] allowed to take part in the argument below and [has] submitted [its] contentions here." *Id. See also Loretto v. Teleprompter*, 53 N.Y.2d 124, 132, 440 N.Y.S.2d 843, 846 (1981).

(continued...)

Petitioners strain to contest Escondido's regulatory law and its effect on their property. Their challenge is to a particular aspect of the Ordinance—the prohibition on unlimited rent increases to subsequent tenants.[8] According to petitioners, this causes a "transfer of premium value to departing mobile home tenant, representing value of right to occupy at reduced rate under local mobile home rent control ordinances [sic]."[9] The appropriate analysis for such a claim is the well-established standard for regulatory takings. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

Petitioners also contend the transfer is incident to a permanent physical occupation of land. As such, petitioners hope to subject it to the more rigorous analysis of "possessory takings" as developed in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Thus, critical to petitioners' takings claim is the nature of the challenged governmental action. The "possessory takings" doctrine is a recognition that some interferences with property are qualitatively more serious than others, and cannot usually be justified by countervailing public needs short of compen-

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[7](...continued)
This rule, whether it be jurisdictional or simply a matter of comity, was codified in 28 U.S.C. § 2403 (50 Stat. 751 (1937)). This requires the court clerk to certify to the state and allow participation where "the constitutionality of any statute of that State affecting the public interest is drawn in question," unless the state is already a party. *See Merrill v. Town of Addison*, 763 F.2d 80, 82 (2d Cir. 1985). The presence of the City of Escondido does not satisfy § 2403 as far as the MRL is concerned. *International Paper v. Town of Jay, Me.*, 887 F.2d 338, 340-41 (1st Cir. 1989).

[8] Landlords may seek rent increases necessary to assure a "fair return." Ord. § 4(g). But, they may not impose unilateral rent increases; a feature commonly referred to as "vacancy control." It is this feature that petitioners claim works the taking. *See also Azul Pacifico*, slip op. at 3, 10-11.

[9] Cert. Pet. at i, Questions Presented (No. 1).

sation. However, petitioners' resort to the possessory takings doctrine is based on a simplistic and flawed application of *Loretto*. Not every economic regulation accompanied by occupancy results in a possessory taking. This is particularly true where occupancy does not result from the challenged governmental action.

Also critical to petitioners' case is the identity of the property interest affected by the law. Not all interests in property are protected by the Fifth and Fourteenth Amendments. The answer depends on whether the interest asserted is a "reasonable, investment backed expectation" in light of existing state law. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

Accordingly, two threshold issues emerge in this case: (1) whether the Escondido Ordinance results in or authorizes permanent physical occupation of land; and (2) whether a recognized and discrete property interest is taken from the park owner. Petitioners must establish both of these points in order to prevail on their takings theory. The court below properly rejected the complaint because petitioners cannot establish either of them.

ARGUMENT

I. OCCUPANCY OF RENTAL PROPERTY AT REGULATED RENTS DOES NOT CONSTITUTE A POSSESSORY TAKING

The first suggestion that rent and eviction controls might be analyzed under the possessory taking strand appeared in Chief Justice Rehnquist's dissent from dismissal of appeal in *Fresh Pond Shopping Center v. Callahan*, 464 U.S. 875 (1983). Other than that, no case in this Court has used that analysis. Nor does the instant case necessarily turn on the correctness of *Fresh Pond*, because the cases are sufficiently distinct in key areas. However, the notion

that regulations extending tenancy rights effect a permanent physical invasion would work an unwarranted expansion of existing law.

A. Rent And Eviction Controls Do Not Result In A Permanent Physical Occupation Of Land.

1. This Is Not A Case Of Ouster Nor The Imposition Of An Unwanted Use.

The possessory takings doctrine originated in this Court in early cases where property was seized and owners were "ousted" from possession of their land. Ouster occurs where property is forcibly invaded "so as to effectually destroy or impair its usefulness." *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166, 181 (1872).[10] Later cases extended inverse condemnation theory to governmentally imposed new and unwanted uses on property, accompanied by the physical presence of uninvited users. *Kaiser Aetna*; *United States v. Causby*, 328 U.S. 256, 262-263 (1946). Both variants presuppose impediment to the owner's use and destruction of value in that portion of property occupied. Neither has occurred here.

Third party possession and unwanted use have been essential elements in this Court's possessory takings cases. For instance, not only was the occupying cable company in *Loretto* a "stranger," 458 U.S. at 420, so too was its use of the property. The use was new, unintended, and uninvited. Indeed, had the New York law required the landlord to accept a tenant, rather than a cable attachment, the case

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[10] *Pumpelly* represented the "extremist qualification" placed on the state's police power by the Constitution. *Northern Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878).

would have been decided differently.[11] *FCC v. Florida Power Corp.*, 480 U.S. 245 (1988) demonstrates the importance of this element. Since the challenged act did not "require a power company to dedicate a portion of its pole plant to communications use," 480 U.S. at 251 n.6, *Loretto* did not apply. "It is the invitation, not the rent, that makes the difference." *Id.* at 252. [12]

Eviction laws which extend tenants' right of occupancy beyond the contract term are not "possessions" as that term has been understood in takings jurisprudence. This is true even where continued occupancy may be indefinite.[13] Nor

[11] The Court in *Loretto* specifically distinguished *Block* and *Edgar A. Levy Leasing*, reading those cases as not involving government action which "author-iz[ed] the permanent occupation of the landlord's property by a third party." 458 U.S. at 440.

[12] *See also Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987) (right to exclude applies to "property reserved by its owner for private use"); *id.* at 832 n. 1 (describing *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980) as not involving possession "since there the owner had already opened his property to the general public"). Similarly, in *Munn*, Chief Justice Waite cited numerous examples in English common law where a property owner permitted public use of his property and therefore became subject to price regulation. 94 U.S. at 127-28. For instance, he quoted Judge LeBlanc in *Aldnutt v. Inglis*, 12 East 527, 541 (1810):

> Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the question is, whether the warehouses be not private property clothed with a public right, and, if so, the princi-ple of law attaches to them."

The "principle of law" was that the crown might set "reasonable compensation" for the use of the property. *Id.* at 537.

[13] *See* Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 1000-1004 (1989) ("Tenant Eviction Protection"). *See also Troy v. Renna*, 727 F.2d 287 (3d Cir. 1984) (upholding eviction law extending tenancies for senior citizens and disabled tenants for as long as forty-eight years); *Help Hoboken Housing v. City of Hoboken*, 650 F.Supp. 793 (D.N.J., (continued...)

does the conclusion change merely because occupancy rights may survive the tenant in possession, and can be transferred to another. The user might not have been hand-picked by the landlord, but the use surely was.[14] By entering into the rental housing business, the landlord has voluntarily yielded certain rights to regulation, notably those associated with possession. Occupation of rented property by tenants is hardly a "strange" use. Rather, it is the very heart of the landlord's "investment-backed expectation."[15]

[13](...continued)
1986) (state may require landlords to place units back onto the market after they have been withdrawn).

[14] The importance of the distinction between new users and new use is illustrated by comparing *Eamiello v. Liberty Mobile Home Sales*, 208 Conn. 620, 546 A.2d 805 (1988), *appeal dismissed*, 489 U.S. 1002 (1989), with *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989). In the former, the court held that statutory extension of a voluntarily assumed use was "not equivalent to a governmentally sponsored physical invasion." 208 Conn. at 645-46, 546 A.2d at 818. While in the latter, the court ruled that a mandatory rent-up provision was a possessory taking because it "subject[ed landlords'] properties to a use which they neither planned nor desired." 74 N.Y.2d at 105, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548. The court added: "it is the forced occupation by strangers . . . not the identities of the new tenants or the terms of the leases, which deprives the owners of their possessory interests." *Id. See also Casella v. City of Morgan Hill*, 230 Cal. App. 3d 43, 280 Cal. Rptr. 876 (1991)

[15] In *Lindsey v. Normet*, 405 U.S. 56, 72 (1972), this Court noted the "unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment." This supplies another reason for exempting landlord-tenant regulations from strict application of possessory takings doctrine--the evolution of landlord-tenant relationships from one rooted in property law to one that is contractual in nature. *See id.* at 86-87 (the "feudal notion of landlord-tenant law--rooted in the special needs of an agrarian society--has not been a realistic approach to landlord-tenant law for many years, and has been replaced by what eminent authorities have described as 'a predominantly contractual' analysis of leasehold interests") (Douglas, J., concurring and dissenting). *See also Javins v. First National Realty Corp.*, 138 U.S. App. D.C. 369, 373, 428 F.2d 1071, 1075 (1970) ("leases of urban dwelling units should be interpreted and construed like any other contract").

In short, statutory extension of an existing intended use is not tantamount to possession.[16] Instead, what matters is whether the physical occupation is equivalent to ouster---dispossessing the owner of essentially all rights in the occupied property. Here, where petitioners have selected the use and still derive substantial value, their claim of ouster is illusory.

2. A Possessory Taking Will Be Found Only Where Occupation Extinguishes Value In The Property Possessed.

In order to find a possessory taking, possession must result in the extinction of value in that portion of property possessed. *See Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting). For instance, in *Loretto*, the cable attachment usurped the entire value of the space it occupied.[17] In both *Nollan* and *Kaiser Aetna*, the imposition of easements relegated the owner to the same rights in that property as enjoyed by the public for free. In *Pumpelly*, by occupying

[16] In *Florida Power*, the Court suggested that this was an open question. "We do not decide today what the application of *Loretto* . . . would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." 480 U.S. at 289 n.6. However, this referred to the property owner's right to change use, not merely to continue it with a different occupant. *See supra*, n.14. Statutory lease extension has no effect on the landlord's use of the property, nor does it deprive the owner of "control over the timing, extent, or nature of the invasion." *Loretto*, 458 U.S. at 436. The Escondido Ordinance does not mandate any particular use of the property, or even restrict its use. Indeed, both the Ordinance and the MRL specifically authorize termination of tenancies pursuant to a change in use. Ord. §6(a)(6); Cal. Civil Code § 798.56.

[17] The property occupied by the cable company was rendered valueless to the owner. The owner could not occupy that part herself, she could not exclude, and she could not derive benefit either from the user or through sale of the property. Indeed, the regulation "chop[ped] through the bundle [of rights], taking a slice of every strand." 478 U.S. at 435.

the entire parcel's surface, the state took all use and value of the land.

This explains why not all regulation of property incident to physical occupation is analyzed under the possessory takings doctrine. *See Pennell* (apartment rent control not viewed as a possessory taking despite physical occupation by tenants);[18] *Florida Power* (rate regulation of pole attachments analyzed under regulatory takings strand); *Munn* (fixing grain storage rates was permissible).

Petitioners attempt to mold the instant case into a possessory taking by claiming both possession and complete extinction (through transfer) of value. But, even if tenant occupancy constitutes "possession," the possession and the lost value are of different things. The possession is of a physical space—the mobilehome pad. On the other hand, the transfer is of a noncorporeal interest—the right to inflated profits through higher rent. Even accepting that this interest has been completely transferred, it is neither physically discrete nor coterminous with the possession.[19] The landlords' rights in the physical space, the proper inquiry in possessory cases, are hardly extinguished. Not only does the pad retain substantial value, its continued rental meets the landlords' expectations.

Were the rule otherwise, physical presence alone would become talismanic under the takings clause. Yet, other cases in this field have focused on the extent of regulation, and required substantial deprivation to find a taking. The point is illustrated by comparing *Pruneyard*

[18] Justice Scalia, who reached the takings issue in *Pennell*, rested his separate opinion on regulatory takings theory, and did not suggest that indefinite occupation by tenants required a possessory takings analysis. 485 U.S. at 15.

[19] Nor is it fractionable for Fifth Amendment purposes. *See infra*, p. 26.

with *Kaiser Aetna*. Both cases involved the unwanted physical presence of strangers. Also in both, the property owner was deprived of the right to exclude, one of the "essential sticks in the bundle of property rights." *Kaiser Aetna*, 444 U.S. at 179-180. Yet, in the former, the interest taken had no appreciable value, nor did it affect the property's use (*Pruneyard*, 447 U.S. at 83), while in the latter, "petitioners had invested millions of dollars" (*Kaiser Aetna*, 444 U.S. at 169), whose recapture through rents was cut off by the presence of non-paying users.[20]

Since petitioners are not deprived of either use or value in the physical property occupied by tenants, they cannot state a claim for a possessory taking.

B. Mobilehome Rent and Eviction Controls Do Not Extinguish Possessory Interests

This Court has identified three essential rights in property: to possess, use, and dispose. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). While petitioners' right to possess is constrained, it is by their own voluntary action in devoting the property to rental use in

[20] Any suggestion that *Pruneyard* stands apart from other possessory takings cases solely because the use was temporary rather than permanent (*see Loretto*, 458 U.S. at 434), is undercut by later cases that have rejected a distinction between temporary and permanent takings. *See Nollan*, 483 U.S. at 832, ("a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and from, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (temporary taking was compensable). Rather, *Pruneyard* found against a possessory taking because "appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" 447 U.S. at 84. The present case is directly apposite.

the first instance, not through invasion by the state. Moreover, petitioners retain essential reversionary interests.

1. A Mobilehome Owner's Right To Sell His Coach On Site Does Not Deny The Park Owner Reversionary Rights

A mobilehome owner's bare right to sell his coach on site abrogates little if any possessory rights the landlord has in the property. It constitutes neither permanent nor indefinite occupation because the landlord's reversionary rights remain intact. He may evict for customary business reasons,[21] change the park's use (subject to generally applicable use restrictions),[22] or terminate the use.[23] The only reversionary right arguably taken from the landlord is the ability to select the next tenant. However, the landlord still retains essential rights of prior approval.[24]

In this regard, the MRL is no more intrusive than the developing common law rule regarding lease assignment.[25]

[21] *See, e.g.*, Cal. Civil Code §798.56 (violation of lease, park rules, non-payment of rent); Cal. Civil Code §798.61 (abandonment); Cal. Civil Code §798.73 (old or rundown coaches).

[22] Cal. Civil Code §§ 798.10, 798.56.

[23] *Loretto* rejected the defense that invasion by cable was acceptable because the landlord retained the right to withdraw the building from rental service. 458 U.S. at 439 n.17. That was seen as an unconstitutional condition because there was no substantial nexus between the condition (cable presence) and use (rental business). *See Nollan*, 483 U.S. at 838, 841. Here, however, the condition (rental use by tenants) is not only related to, but is, the use. Accordingly, the conferred statutory right of tenancy in a mobilehome park is precisely the use which the landlord has made of his property. He may terminate the use, and the user, without having to sacrifice any property rights.

[24] *See* Cal. Civil Code §798.74.

[25] In California, restrictions on commercial lease assignment may be void as contrary to public policy. This flows from the rule prohibiting restraints on alienation. *Kendall v. Pestana*, 40 Cal. 3d 488, 709 P.2d 837, 220 Cal. Rptr. 818 (1985) (consent to lease assignment may not be unreasonably withheld).

(continued...)

Restrictions on the ability to exclude, which have figured prominently in other contexts, do not implicate important property rights where possession by others is the very essence of the use made by the owner. *Cf. Loretto*, 458 U.S. at 434 ("the owner [in *Pruneyard*] had not exhibited an interest in excluding all persons from his property"). State intervention, including limitations on owners' ability to select or arbitrarily exclude tenants, is as unremarkable in the heavily regulated rental housing business as it is with innkeepers. Anti-discrimination statutes and common law rules already circumscribe landlords' ability to reject tenants for non-business reasons.[26]

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[25](...continued)
See also Prestin v. Mobil Oil Corp., 741 F.2d 268 (9th Cir. 1984). For other jurisdictions adopting this rule, *see Kendall*, 709 P.2d at 841, 220 Cal. Rptr. at 822; Annot., 21 A.L.R.4th 188 n.9 (1983). *See also* R. Powell & P. Rohan, *On Real Property*, 246[1] (1988) ("[w]ith the shortage of housing and, in many places, of commercial space as well, the allowance of lease clauses forbidding assignments and subleases is beginning to be curtailed by statutes"). At least one court has equated the developing rule on lease assignment with the transferability of mobilehome occupancy rights. *See Eamiello*, 208 Conn. at 646, 546 A.2d at 818.

[26] In *Hall*, the court declared that the landlord's right to select tenants was "an important attribute of ownership." 833 F.2d at 1279 n.23. Yet, in the heavily regulated area of landlord-tenant relationships, a plethora of statutory and judicial developments have constrained the landlord's ability to reject tenants. *See, e.g.*, Fair Housing Act, 42 U.S.C. §3601-3631 (1982); *Eamiello*; *Tirolerland v. Lake Placid 1980 Olympic Games*, 592 F.Supp. 304, 316 (N.D.N.Y. 1984) (rejecting taking challenge to ordinance limiting room rates and tenant eligibility; "the Court has serious doubts whether an interference with the right to select one's tenants can amount to an unconstitutional taking"). *See also Schweiso v. Williams*, 150 Cal.App.3d 883, 198 Cal.Rptr. 238 (1984) (in lease assignment cases, "denying consent solely on the basis of personal taste, convenience or sensibility or in order that the landlord may charge a higher rent than originally contracted for have been held arbitrary reasons failing the tests of good faith and reasonableness").

2. Monetized Rent Savings Do Not Constitute A Possessory Interest

The court in *Hall* distinguished the Santa Barbara ordinance from apartment rent control on the ground it enabled an outgoing tenant to "liquidate" his rent savings "and take [it] with him when he leaves the property." 833 F.2d at 1279. Petitioners similarly argue that the Ordinance transfers a possessory interest which the tenant reduces to money when selling his home. Pet. Br. at 14. Yet, the economic benefit conferred by Escondido is below market rents, not possession.

The benefit of rent control is no more a possessory interest than any other situation where cost savings accompany possession. If price control is not itself unconstitutional, the fact that a consumer realizes a monetary benefit after his use and possession of a commodity terminates should not compel a different conclusion. Otherwise, any mechanism which controlled wholesale but not retail prices would be unconstitutional, because the retailer could pocket the "monetized" value of the wholesale price reduction when reselling the item at an unregulated price.[27] Indeed, the mobilehome owner's ability to "liquidate" below market rents when he leaves the property is remarkably similar to a homeowner's ability to capitalize below market interest rates into the sales price of his house, which he could do by transferring the mortgage to the purchaser. *See Wellenkamp*

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[27] Although the precise issue has not been addressed by the Court, many of the price control schemes upheld against due process and takings challenge appear to have had this feature and effect. *E.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (fixing maximum wholesale price of natural gas); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) (upholding a New York law imposing maximum wholesale prices while decontrolling retail prices). In each case, the regulatory beneficiary acquired possession of goods at reduced prices. He was also able to transfer possession at an unregulated price, thereby reaping the difference.

v. Bank of America, 21 Cal. 3d 943, 148 Cal. Rptr. 379, 582 P.2d 970 (1978).[28] In short, if it is not a taking to authorize a tenant to remain on the property at reduced rents indefinitely, it is hard to understand how it becomes a taking when the tenant leaves.

3. Permanent Physical Occupation, If Any, Is Caused By The MRL; It Is Not Attributable To Escondido

Petitioners contend that a taking results from the combined effect of the Escondido Ordinance and the MRL. No serious contention can be advanced that the Ordinance, by itself, authorizes physical occupation, creation or alienation of leasehold, or any other possessory rights. Rather, any such restriction on petitioners' right or title existed at the time the Ordinance was enacted.[29]

This Court has been clear that government action alleged to cause a taking must be measured against the backdrop of existing law and title. In *Boston Chamber of Commerce v. Boston*, 217 U.S. 189 (1910), the Court refused to order compensation to a fee owner when a pre-existing easement had already affected the value of the fee. "The Constitution . . . does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole." *Id.* at 195.

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[28] The homeowner's right was judicially recognized when the California Supreme Court ruled that a mortgage due-on-sale clause was an impermissible "restraint on alienation," and therefore unenforceable. In *Fidelity Federal Savings And Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), this Court held the *Wellenkamp* rule was preempted by federal law.

[29] Indeed, according to the Court in *Azul Pacifico*, it is not necessary for the vacancy control provisions of the Ordinance to be ever implemented. "[T]here would be a taking even if, for some reason, *no* coaches were sold following passage of the ordinance." __F.2d at __ (slip op. at 18) (original emphasis).

Whether a law extinguishes ownership rights or otherwise goes "too far" depends upon the uses available without the challenged restriction. Here, absent the Ordinance, petitioners might be able to collect higher rents, but they would exercise no more control over possession than they do now.[30] *See Eamiello; Thompson v. Merlino*, 208 Conn. 620, 545 A.2d 1094, *appeal dismissed*, 488 U.S. 1024 (1989).[31] The most that can be said about the Ordinance is that it marginally effects value; hardly an unusual or unconstitutional feature of land use regulation.

II. THE INTEREST PETITIONERS CLAIM TO HAVE BEEN TAKEN AND TRANSFERRED TO TENANTS IS NOT COMPENSABLE.

A. Appreciated Site Value Does Not Constitute Fifth Amendment Property.

Petitioners' theory relies heavily on the mobilehome owners' ability to capitalize future rent savings. Such savings reflect the difference between market and controlled rents. *Azul Pacifico*, __F.2d at __ (slip op. at 11). Rent control in Escondido, as elsewhere, does not actually set

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[30] It has been suggested by some that the Escondido Ordinance is invalid, not because it causes a taking, but because it prevents park owners from obtaining just compensation for the taking caused by the MRL. If this be the case, suing Escondido for damages makes no more sense than holding the California Supreme Court liable after *First English*, for that court's refusal to allow damages in inverse condemnation.

[31] The Court in *Azul Pacifico* distinguished these Connecticut cases on the ground they involved protected tenancy, but not rent control. __ F.2d at __, (slip op. at 9 n.3). Actually, Connecticut does limit rent increases in a manner that may be operationally similar to the Escondido Ordinance. *See* Note, *Mobile Home Parks and Connecticut's Regulatory Scheme: A Takings Analysis*, 17 Conn. L. Rev. 811, 830 n.101 (1985) ("Mobile Home Parks") ("[b]ecause [Connecticut's] statute is designed to prevent the park owner from depriving the home owner of his home's increase in value secured by its location in a mobile home park, increased rents intended to recover that value would be prohibited").

rents, but imposes ceilings on rent increases. Thus, at the inception of controls, market and regulated rents are roughly equivalent.[32] Any site value resulting from a mobilehome's placement in the park is presumably incorporated into market rents and captured by the landlord.[33] As market rents escalate with appreciation in property value, or in response to increasing space scarcity,[34] and permitted rent increases fail to keep pace, "rent savings" are created. Petitioners claim the Ordinance capitalizes the savings over the anticipated life of the use, generating a "windfall" for the departing mobilehome owner. The question in this case is whether the state may lawfully repose this additional appreciated value in the mobilehome owner, or whether it is naturally and constitutionally the exclusive property of the landlord.[35]

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[32] The Ordinance contains a rent roll-back provision which sets "base rent." Ord. § 3. This is typical in newly enacted rent control laws. Its purpose is to restore rents to hypothetical equilibrium conditions; i.e., to approximate market rents. The theory is that contract rents can exceed market rates if landlords raise rents in anticipation of rent control, or if vacancy rates are so low as to give rise to monopoly conditions. *See Oceanside Mobilehome Park Owner's Ass'n. v. City of Oceanside*, 157 Cal. App. 3d 887, 906, 204 Cal. Rptr. 239, 251 (1984); Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 Rutg. L. Rev. 721, 766-67 (1983).

[33] See Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobilehome Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 426-28 (1988).

[34] Amici agree with respondent that the rents which would obtain absent rent control are not "market rents" at all, but artificially high rents due to virtual landlord monopoly. The principal purpose of rent control is "to restore free market conditions by limiting rent increases to the level which would occur under general market conditions—a competitive market as opposed to a monopolistic or oligopolistic one." *Oceanside*, 157 Cal. App. 3d at 905, 204 Cal. Rptr. at 251. *See also* 4 Sackman, *Nichols' The Law of Eminent Domain* (1990), p.12B.71 ("Law of Eminent Domain").

[35] As noted above, rents the parkowner could charge absent rent control might reflect exploitive conditions as well as appreciated value. There can be little

(continued...)

Property rights, as a general rule, are neither created nor defined by the constitution. "They are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). Of course, once having created a property interest, the state is not at liberty to expunge it in derogation of reasonable investment backed expectations. But, unless preexisting state law guarantees property owners a right to profit from future appreciation, that anticipated gain does not constitute Fifth Amendment property. "Frustration and appropriation are essentially different things." *United States v. Grand River Dam Authority*, 363 U.S. 229, 236 (1960).

1. Appreciation Is The Result Of Governmental Land Use Decisions; Appreciated Value Is Created By The State.

The bottom line of petitioners' complaint is that the Ordinance prevents them from obtaining compensation for the full appreciation of the sites in their parks, as measured by increased rents. That very appreciation, however, is driven by a scarcity of mobilehome sites which itself is a consequence of local land use regulation. Restrictive zoning policies can and do lead to monopoly or near-monopoly powers among owners of mobilehome parks.[36] "The

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[35](...continued)
Fifth Amendment claim to such rent levels. *Casella*, 230 Cal.App.3d at 54, 280 Cal. Rptr at 882-83. Moreover, even under petitioners' theory, the Ordinance does not transfer all appreciated value. Rather, the bulk of the appreciation is due to alternative potential uses of the land, and is unaffected by limitations on rent. If and when the land is converted to a higher use, which may lawfully occur, the property owner is likely to realize this inchoate appreciation. *See* Shulman, *Real Estate Valuation Under Rent Control*, 9 Am. Real Est. & Urb. Econ. Ass'n J. 38 (1981).

[36] See *Cider Barrell Mobile Home Court v. Eader*, 287 Md. 571, 574, 414 A.2d

(continued...)

mobile home market is an example of a monopoly, which is a market failure, rather than a market, and is a prime candidate for government regulation." *Azul Pacifico v. City of Los Angeles*, 740 F. Supp. 772, 781 (C.D. Cal. 1990).

In another rent control case, this Court noted that "Government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly . . . ." *Pennell*, 485 U.S. at 11. Here, local land use policies have created conditions that enable the park owners, absent rent control, to capture the attendant monopoly profits and deplete the tenants' equity. There can be no question that the government can intervene to ameliorate this situation.[37]

The state having created the possibility for appreciation through legislated scarcity, can permit the landlords, the tenants, both, or neither to capture any appreciation that

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[36](...continued)
1246 (1980); Baar, *The Right to Sell the 'Im'mobile Manufactured Home in its Rent Controlled Space in the 'Im'mobile Home Park: Valid Regulation or Unconstitutional Taking?* 24 Urban Lawyer No. 2 (forthcoming, 1992); *Mobile Home Parks*, *supra*, n.31, at 812.

[37] Prior to enactment of the MRL, it was widespread practice in California for park owners to "tie" space rental to mobile home purchases in an effort to exploit space scarcity. *See, e.g., Suburban Mobile Homes, Inc., v. Amfac Communities, Inc.*, 101 Cal. App. 3d 532, 161 Cal. Rptr. 811 (1980) (tying arrangement by park owner and mobile home dealers violated state antitrust law); *People v. Mobile Magic*, 96 Cal. App. 3d 1, 157 Cal. Rptr. 749 (1979) (conditioning the rental of sites on the purchase or lease of mobile homes from certain retail dealers was illegal); *Sherman v. Mertz*, 42 Cal. App. 3d 769, 117 Cal. Rptr. 188 (1974) (agreement between park owner and mobile home dealers providing kick back of profits from tied mobile home sale and space lease were in restraint of trade); *Jomicra v. California Mobile Home Dealers' Ass'n*, 12 Cal. App. 3d 396, 90 Cal. Rptr. 696 (1970) (describing growing practice of "closed parks" where entry is conditioned on purchase of home from approved dealers, raising "a serious issue of illegal conduct to restrain trade and competition"). *See also Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980) (reversing summary judgment for park owner on allegation that defendant violated Clayton Act by illegal "tie-in" arrangement).

may exist. Thus, the state could impose resale price controls on on-site sales of mobilehomes; then, no one would receive the "premium." The state could require that the landlord and tenant split any appreciation upon sale of a mobilehome. The state could enact vacancy decontrol, allowing the landlords to capture the entire "premium."[38] Or, the Escondido system could prevail.

Any of these choices would be constitutional, and all for the same reason: potential site appreciation is not anyone's constitutional entitlement.

> In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near-monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle.

Eamiello, 546 A.2d at 820.[39]

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[38] Indeed, the parkowner could capture more than the site value of the pad. Because the mobilehome is captive, the landlord's superiority of right enables him to enhance his own profit through depletion of the homeowner's equity. *Azul Pacifico*, 740 F. Supp. at 744. This has led to exploitive conditions. *See Stewart v. Green*, 300 So.2d 889, 892 (Fla. 1972) ("a form of economic servitude ensues rendering tenants subject to oppressive treatment in their relations with park owners"); *Mobile Home Parks*, *supra*, n.31, at 815 (describing how some evicted owners have lost the full value of their homes); Note, *Mobilehomes: Present Regulation and Needed Reforms*, 27 Stan. L. Rev. 159, 166-67 (1974) (landlord abuses can "destroy the homeowner's equity in his unit"); *Tenant Eviction Protection*, *supra*, n.13, at 965 n.223. Hawaii responded to a similar situation with its Land Reform Act, Haw. Rev. St. Ch.516 (1967 Haw. Sess. Laws 488), upheld in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

[39] In *Penn Central Transp. Co. v. New York*, 42 N.Y.2d 324, 328, 366 N.E.2d 1271, 1273 (1977), the New York Court of Appeals excluded "the publicly created components" of property value in its takings analysis. This Court noted, but did not rest its decision on, this approach. *Penn Central*, 438 U.S. at 121 n.23. *See also Gateway Apartments v. Nutley*, 605 F.Supp. 1161, 1163 (D.N.J.

(continued...)

To say that this appreciation is a property right that may not be taken without compensation is to make government the guarantor of anticipated gains. This is not the law. *Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests"); *Penn Central*, 438 U.S. at 130 (holding "untenable" the proposition that landowners may establish a taking "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development"); *United States ex rel T.V.A. v. Powelson*, 319 U.S. 266, 282 (1943) ("in the absence of a statutory mandate . . . the sovereign must pay only for what it takes, not for opportunities which the owner may lose").[40] Reposing the gain elsewhere, as would occur with substantial capital gains taxes or resale price controls, does not take from the property owner any constitutional entitlement he had.[41]

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[39](...continued)
1985) (state could require landlords to pass 75% of any property tax rebates through to tenants, since the monies were not pre-existing landlord property. Otherwise, it "would result in a windfall to landlords and deny to tenants the right to participate in a refund which they in large measure created").

[40] Anticipated future gain is generally excluded for valuation purposes in condemnation proceedings because it is too speculative. *General Motors*, 323 U.S. at 379 ("compensation . . . does not include future loss of profits . . . or other like consequential losses"). *See generally Law of Eminent Domain*, *supra*, n.34, at Vol. 5, pp.19-7, 19-31.

[41] In essence, petitioners seek to socialize their losses, while privatizing their gains. Fortunately, the Fifth Amendment is not so uni-directional. *See generally* D. Hagman, *Windfalls for Wipeouts*, 18 (1978) (in "recapturing windfalls . . . [t]he community is asking only for a return of wealth it creates").

2. The Owner's Loss, Rather Than Another's Gain, Determines Whether A Taking Has Occurred.

Petitioners' theory of a windfall transfer to homeowners focuses on the wrong end of the equation--what the government has gained, rather than what the owner has lost. Indeed, in *Azul Pacifico*, the court found and measured a taking by reference to the homeowner's increased equity in his mobilehome.[42] There are two reasons why this is error.

First, from the parkowner's perspective, mobilehome rent control, even in conjunction with the MRL, is operationally the same as apartment rent control. With both, the landlord operates his property at regulated rents and with reduced control over tenant tenure.[43] Although the MRL gives tenants a qualified right to select successors, this has little if any impact on landlord's use or expectations.

Second, the fact that departing tenants realize transient rent savings after their tenancy does not equal loss to the parkowner. *General Motors*, 323 U.S. at 378 ("deprivation of the former owner rather than accretion of a right or interest to the sovereign constitutes the taking"). Indeed, absent the MRL, the only way the landlord could capture

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[42] The approach in *Hall* and *Azul Pacifico*, of measuring damages by the tenant's gain, rather than the landlord's loss, is contrary to law. *Kimball Laundry v. United States*, 338 U.S. 1, 5 (1948) ("[b]ecause gain to the taker . . . may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation"). *See also Law of Eminent Domain*, *supra*, n.34, at §12.03. Indeed, the trial court in *Azul Pacifico* noted that "*Hall* break[s] from the traditional 'loss' measure of damages for takings cases," but was nevertheless constrained by the Ninth Circuit rule. 740 F.Supp. at 778.

[43] *Nollan* illustrates this equivalence. There, transient and fungible beachgoers constituted "permanent" occupiers because, from the owner's perspective, their changing identity was irrelevant to his loss. 483 U.S. at 831-32. By a similar token, the fact that a succession of users enjoy eviction protection under the MRL, rather than just the tenant in possession, does not alter the analysis.

site premium is by engaging in illegal or exploitive practices. *See supra*, *n.*37, 38.

In essence, petitioners complain that mobilehome owners get too high a price for their homes upon sale; that some of the purchase price results from restrictions on the park owners' property. Of course, a similar complaint can be heard from any property owner where restrictions on his use enhance the value of neighboring property.[44]

B. Appreciated Site Value Is Not A Discrete And Severable Property Interest; It Cannot Be Analyzed In Isolation.

1. Intangible Property Interests Are Not Fractionated In Takings Cases.

In an effort to paint this as a possessory takings case, petitioners contend that the Ordinance transfers a discrete, severable, and marketable interest to tenants, to wit: appreciated site value. Such an attempt to segregate this intangible component of value from the remainder of their property interest must fail.

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[44] In this regard, property rights are often complementary. Enhancement of one parcel means devaluation of another. This has not been sufficient to make out a takings claim at least since the advent of zoning. Nonetheless, petitioners suggest that regulation is permitted under the takings clause only where reciprocity of advantage occurs. Theirs is an unwieldy principle, requiring that each legislative act provide equal benefit. Professor Michelman has the better view, that due process requires only "an acceptable level of assurance that over the life of a society (and within the expectable lives of any of its members) burdens and benefits will cancel out leaving something over for everyone." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1179 (1967). *See also Keystone*, 480 U.S. at 491 n.21. Land owners in general, and mobilehome park owners in particular, receive substantial economic benefit from tax, land use, and other legislative choices.

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . . *Penn Central*, 438 U.S. at 130.[45]

The ramifications of fractionating property interests when undertaking a takings analysis are severe. If a conceptual interest in property can be viewed in isolation from the property as a whole, then any regulation which extinguishes or severely restricts that interest will constitute a taking. *See Keystone*, 480 U.S. at 498.

The rule is different in the case of discrete physical property because each segment, no matter how small, embodies the full bundle of rights we commonly call property. *General Motors*, 323 U.S. at 377-78. *Cf. Loretto*. Thus, each case in this Court where fractionating was allowed involved tangible property. However, particular interests in property, such as the rights to alienate (*Andrus*) or earn higher returns (*Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989)), are never fractionated.[46] *Keystone*, 480 U.S. at 497-98 (taking analysis does not divide property into discrete segments; rather it examines interference with

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[45] *Penn Central* goes even further than necessary for this case. While the Court recognized that appellants' air rights constituted an established property interest that could be separably transferred (*id.* at 130, 137), and was transferred, this factor was not relevant in assessing appellants' takings claim.

[46] This distinction also reinforces the special character of physical invasion of tangible property, because all rights in the property so occupied are lost. *See supra* p. 12. Yet, non-possessory interferences still leave viable economic use.

property rights in the parcel as a whole); *Andrus*, 444 U.S. at 65-66 (the property subject to regulation must be viewed in the aggregate; denial of one property right does not constitute a taking).[47] Petitioners ask this Court to treat the instant case as if it were a routine possessory takings case where discrete physical property is invaded by a stranger. However, the property petitioners claim has been expunged by the Ordinance is not the pad space at all, but the intangible right to collect higher rents. This right cannot be severed from the remainder of petitioners' property for takings analysis.[48] It is neither an identifiable segment of physical property nor a distinct estate in land recognized by law. Petitioners' attempt to mix possessory and regulatory takings concepts is pernicious and should be rejected.

2. Monetized Future Rent Savings Are Not A Discrete And Marketable Property Right

A second reason augurs against treating the so-called transferred site value as a discrete property interest. It simply is not. While homeowners may be able to incorporate the capitalized value of future rent savings into the on-site price of their homes, the interest is not discrete,

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[47] The Court has split in cases such as *Penn Central* and *Keystone* where discrete physical property was rendered valueless by regulation. The outcome of that debate is not relevant here since the property interest petitioners claim is intangible. It is only one stick in a full bundle of rights retained by petitioners. *Andrus*, 444 U.S. at 65-66. Of course, intangible property can be destroyed by possession if governmental action takes all value. *See Ruckelshaus; Hodel v. Irving*, 481 U.S. 704 (1987). While *Hodel* involved only one stick—the right to devise—in the context of that case, that right represented all value. Indeed, its taking resulted in complete loss of the property through escheat. *See Kirby Forest Ind. v. United States*, 467 U.S. 1, 15 (1984).

[48] For instance, in *Duquesne*, the Court refused to segregate a utility's investment in an uncompleted power plant. Rather, it looked to the effect of rate regulation on the business as a whole. 488 U.S. at 313-14.

severable, or marketable by itself. Notwithstanding statements in *Hall* and *Azul Pacifico*, it is the coach that is sold, not the "interest."[49] Petitioners also do not allege that at any time before or after the Ordinance they treated this monetized value as a discrete property interest, or that they could have marketed it.

C. Any Taking That May Have Occurred Has Been Fully Compensated

According to the Ninth Circuit in *Azul Pacifico*, "the taking occurred when the ordinance was passed." __ F.2d at __ (slip op. at 17) n.7.[50] Consequently, compensation must be measured as of that date. *Id.* at __ (slip op. at 20); *De Anza*, 936 F.2d at 1085. While the court was conceptually correct in these matters (*see Law of Eminent Domain, supra*, n.34, chapt. 12A), it failed to recognize that there was no "vacancy-control premium" when the rent control law was enacted and "the taking occurred."

As argued above,[51] controlled and market rents are equivalent at the inception of rent control. At that time, there are no rent savings; hence, no value in vacancy decontrol.[52] In other words, rents collected on the base

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[49] Proof of this point is found in petitioners' anecdotal citation to an incoming tenant purchasing a mobilehome and immediately selling it for a substantial loss. "The use of the land was what I paid for more than the [coach]." Pet. Br. at 10. The new tenant was unable to buy the right of occupancy by itself because it is not a discrete or separately marketable property right.

[50] The court explained: "[t]he ordinance assigned to all of the tenants then on the property the right to capture the full discounted value of occupying indefinitely . . . property at below-market rent. . . . [S]ubsequent coach sales by tenants are irrelevant to the question of how much was taken from the landlord." Id. at _ (slip op at 18).

[51] *See supra*, p. 19.

[52] The option to raise rents in the future may be one of the many components (continued...)

date (set by the landlord himself), and the right to a "fair return" thereafter, provide the landlord with a full measure of compensation for any rights he has lost.[53]

The right of occupancy acquires value with time as land appreciation outpaces permitted rent increases. But, by then, according to the *Hall* theory, the right belongs to the tenant. Appreciation which occurs subsequent to the taking is not compensable.

CONCLUSION

For the foregoing reasons, amici urge this Court to uphold the decision of the California Court of Appeal.

Respectfully submitted,

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[52](...continued)
of overall value in income producing property. However, it is difficult if not impossible to quantify this "option value." Hence, it is excluded from condemnation awards, lest such "speculation and conjecture . . . convert an eminent domain proceeding into a guessing contest." *Law of Eminent Domain, supra*, n.34, at p.12A-2. *See also id.*, at p.12B.11 ("[r]ental value based on the increased value of the property that is occasioned by the prospective condemnation has been excluded, as have future estimated rentals"). Moreover, the option hasn't been entirely lost; only the ability to raise rents above allowed increases (i.e., a "fair return"). This seems even less capable of prediction or quantification. *See id.*, at 12B-66 ("capitalization of hypothetical income . . . has generally been rejected").

[53] *See Law of Eminent Domain, supra*, n.34, at p.12B.10 ("actual rent reserved . . . forms one of the best tests of value"); *Rivera v. R. Cobian Chinea*, 181 F.2d 974, 979 (1st Cir. 1950) (Magruder, C.J., dissenting) ("the 'just compensation' called for would be the equivalent of" the rent paid by the tenant).

PROOF OF SERVICE BY MAIL

State of California
County of Los Angeles ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; That my business address is 11852 Santa Monica Boulveard, Suite 3, Los Angeles, California 90025; that on January 3, 1992, I served the within *Brief Amicus Curiae* in said action or proceedings by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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(Original Signed)

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30

No. 90-1947

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE, *et al.*,
Petitioners,

v.

CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is filed with the consent of the parties and in support of the respondent, as provided for in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

The AFL-CIO is a federation of 89 national and international unions with a total membership of approximately 14,000,000 working men and women. The AFL-CIO, its affiliates, and their members have a strong interest in the constitutional standards applicable to local, state, and federal government regulation of housing in order to protect tenants, as a particular matter, and government economic regulation, as a general matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' brief discusses interchangeably the effects of two distinct pieces of legislation: the City of Escondido's Mobilehome Rent Protection Ordinance, Escondido Municipal Code, § 29-101, *et seq.*, and the State of California's Mobilehome Residency Law, Cal. Civil Code § 798, *et seq.* But the State is not a party to this action; the only defendant here is the City of Escondido; and there is no challenge to the state statute stated in the complaint. Joint Appendix ("J.A.") 2-18. In these circumstances, the only issues before the Court concern the constitutionality of the challenged provisions of the city ordinance. The constitutionality of the state statute is not before the Court in this case.

As a challenge only to the city rent control ordinance, this case is plainly within the run of rent and price control cases, and a decision for the respondent is dictated by this Court's precedents. *See* pp. 20-23, *infra*. In this

amicus curiae brief, rather than simply rest on this sufficient ground, we meet petitioners on their own terms and show that, taken together or separately, neither the city nor the state enactment constitutes a physical or a regulatory taking under the Takings Clause.[1]

To the contrary, these enactments combine to comprise a reasonable and balanced regulatory scheme designed to protect and preserve the legitimate interests of two distinct groups of property owners, in circumstances where the two groups' ownership interests are interdependent. Specifically, these regulations address a unique form of residential housing—the "mobilehome" or "prefabricated home"—in which ownership of a single family home is separate from ownership of the land on which the home sits, and the home, once placed on the land, cannot be removed except at great cost to the homeowner.

Because of these separate ownership interests, the regulations go beyond the problem of excessive rents arising from housing scarcity, which is the common predicate for rent control legislation. The additional problem of particular concern is the homeowner's dependency—his vulnerability to exploitation by the landowner—once the homeowner affixes his home to the landowner's land. The state statute and the city ordinance are designed to protect the homeowner from excessive increases in rent for the land *and* from the destruction or diminution of the value of his investment in his home that results from the landowner's exploitation of that vulnerability. At the same time, both enactments are careful to preserve the landowner's ability to make a fair and reasonable return on his investments in the land and its development. And both enactments apply to any particular landowner only

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[1] We do not address in this *amicus curiae* brief the various threshold arguments made by respondent—that petitioners' taking claims are premature, and that petitioners' regulatory taking claim, which was neither litigated below nor raised in their petition for certiorari, is not properly before the Court. We will also not separately address petitioners' claim that the regulations here violate the substantive requirements of the Due Process Clause.

so long as he chooses to remain in the business of leasing his land for occupation by mobilehome owners.

The state and city enactments are well within the range of legitimate regulatory responses to the problems posed by the combination of ownership interests of mobilehome owners and landowners. All that these regulations may "take" from the landowner is his ability to charge excessive rents—excessive in the sense that the charge includes amounts derived from the landowner's exploitation of both the scarcity of the resource being leased (mobilehome park space) and the dependent position of a homeowner who must affix the product of his investments (his mobilehome and all improvements to that home) to the landowner's land. All that the State and the City "give" to the homeowner is the right to be free of such exploitation on an ongoing basis and the attendant ability to protect the value of *his* investments against the adverse effects of such exploitation. Neither the common law nor constitutional law has ever treated a property owner's ability to take advantage of scarcities or market leverage in order to secure a monetary premium—*viz.*, a return above a fair and reasonable return on his investment—as an inherent property right protected from the effects of government regulation.

In part I, *infra*, we show that in the absence of the city and state enactments here the landowner may extract premiums based not only on the scarcity of mobilehome sites but also on the appropriable quasi-rents that are created by the dependent nature of the homeowner's investments in his home and surroundings once the home is affixed to the landowner's site. The value of the quasi-rents that the landowner may appropriate is not the result of any additional investment by the landowner, but is a function of the investments of the homeowner and the value the homeowner stands to lose if he were compelled to take an action that would benefit neither party—removing the home from the site.

The enactments here are designed to achieve the following results: (1) to limit periodic rent increases to

amounts that provide a fair and reasonable return based on the investments of the landowner and not on his market leverage; (2) to protect against the landowner's ability to extract quasi-rents from the homeowner at the time of sale of the home by, *inter alia*, raising the rent to the purchaser and thereby depressing the sale price of the home; and (3) to give economic incentives to mobilehome owners to invest in improving their homes, their sites, and their communities, by assuring homeowners that they—and not the landowners—will receive the returns on their own investments. The benefits of the enactments thus go to all present and future mobilehome owners and to the greater community.

In part II, *infra*, we show that this Court has repeatedly held that price or rent control regulations—which deprive sellers or landowners of the ability, based on scarcity or on market leverage, to extract premiums in excess of a fair return on investment—do not constitute "takings" under the Takings Clause. This line of decisions governs this case.

As we go on to show, petitioners' efforts to avoid the force of these authorities by recasting the case do not bear analysis. First, we show that all provisions that are even arguably relevant to a physical taking claim are found in the state statute, which is not challenged in this case and thus is not properly before the Court. Second, we show that those state statutory provisions, even if they were properly before the Court, would not effect a "taking." Petitioners' land is occupied by mobilehomes not because of state compulsion, but because of petitioners' commercial choices. Provisions limiting petitioners' control over the identity of their lessees are not different from common regulatory provisions that have, quite correctly, never been considered takings. Third, none of petitioners' arguments approach the requirements this Court has stated for a regulatory taking.

ARGUMENT

I. THE EFFECTS OF THE REGULATIONS ON THE INTERESTS OF THE LANDOWNER AND THE HOMEOWNER

A. The Relationship of the Landowner and the Homeowner in the Absence of the Regulations

It facilitates analysis here to begin with a detailed consideration of the economic relationship of the mobilehome park owner and the mobilehome owner in the absence of the city and state regulations.

1. At the outset of the relationship between a mobilehome owner and a park owner, the mobilehome owner has made two significant investments: the cost of buying the home itself [2] and the cost of transporting and affixing the home to the landowner's site; [3] the landowner, in his turn, has invested in the mobilehome site, utility outlets, and sometimes such amenities as landscaping of common areas, playgrounds, swimming pools and clubhouses.[4]

Although this form of home ownership has been celebrated as "a significant source of affordable housing for American families," [5] there is a severe and well-

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[2] The average sales price of a new mobilehome is between $19,200 and $34,800. Manufactured Housing Institute, *Quick Facts* 1990/91.

[3] The average new mobilehome sold in today's market is 1050 square feet. Drury, *Mobilehome (The Unrecognized Revolution in American Housing)* (rev. ed. 1972) at 102 (1955 and 1966 data); Nutt-Powell, *Manufactured Homes (Making Sense of a Housing Opportunity)* (1982) at 53 (1973 and 1980 data). Transportation of a dwelling of this size requires specialized trucks and loading equipment. Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrols*, 35 U.C.L.A. L. Rev. 399, 404 (1988). The cost of such transportation is substantial, *id.* at 404-05. *See also* Cal. Civil Code § 798.55(a) (West 1982) (citing "the high cost of moving mobilehomes").

[4] *See* Hirsch & Hirsch, *supra*, 35 U.C.L.A. L. Rev. at 405-06 & nn. 22 & 23.

[5] *The Report of the President's Commission on Housing* 85-86 (1982) (noting that prefabricated housing is a major housing source

documented shortage of available mobilehome sites, particularly in California.[6] Among the causes of this scarcity is the prevalence of zoning regulations, which limit the areas where mobilehome parks may be placed, require such parks to meet size specifications, and limit the number of sites within each park.[7] This government-exacerbated scarcity enables the landowner—in the absence of rent regulation—to extract a premium from the mobilehome owner in the rent charged for the mobilehome site.

Once an initial lease agreement is entered into, and the home is affixed to the site, the mobilehome owner must make additional site-specific investments in order to adapt the home to the site, and he typically undertakes as well the kinds of site-specific investments that homeowners generally make to turn a new house into a home. Thus, mobilehome owners often install steps, skirting, walk-

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for "first-time home buyers, the elderly, and low- and moderate-income families," and that such housing accounted for almost 36 percent of all single-family homes sold in the United States in 1981, and for the vast majority of those which sold for under $50,000).

[6] *See, e.g.*, City of Los Angeles, Community Development Department, Rent Stabilization Division, *Rental Housing Study (Mobilehome Parks Under Rent Stabilization)* 57 (1985) ("[v]acant pads were found to be virtually non-existent—only two out of 1,226 appeared in the sample"); Sanchez Talarico Associates, *Alternative Location and Replacement Housing Opportunities for Oxnard Mobile Home Lodge* (Sept. 1988) (only 12 out of roughly 11,000 spaces vacant); Baar, *Mobilehome Ownership in Fremont* 13-14 (Aug. 1991) (total absence of spaces in Alameda and Santa Clara counties).

[7] In the City of Escondido, for example, the zoning laws restrict mobilehome parks to certain areas of the City, restrict the density of homes within the parks, and place minimum size requirements on the development of new parks. *See* Escondido Municipal Code, § 33-190, *et seq.*

For more general discussions of the impact of zoning laws on mobilehome park scarcity, *see* Note, *The Community and the Park Owner Versus the Mobile Home Park Resident*, 52 B.U.L. Rev. 811 (1972); Hearings on S. 2740 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 91st Cong. 1st Sess. vol. 91, at 9 (1969).

ways, and driveways, and may also invest in, *e.g.*, landscaping, carports, porches, and decks.

2. When the term of the initial lease runs out, the homeowner is in a considerably weakened position with respect to the negotiation of a successor lease. Were he to be unable to obtain a successor lease, a homeowner wishing to retain his home would have to bear all of the following transaction costs of removing his home from the site:

> (a) He would lose the investments he made in adapting the home to the site and improving the site.
>
> (b) He would have to pay the considerable costs of transporting the home to a new park.
>
> (c) He would have to pay the costs of repairing the damage to the home that often occurs when a home is removed from the site to which it has been affixed. *See* Cal. Civil Code § 798.55(a).
>
> (d) He would have to bear the financial and psychological costs of searching for a new location in a scarcity market where a convenient and vacant spot might not easily be found. *See* note 6, *supra*.
>
> (e) As with anyone else having to move, he would suffer the subjective, non-economic costs of detaching himself and his family from the community in which they have been living. Having to move might mean that children have to change schools, the family has to go to a different church, and other relationships are lost or diminished.

In negotiating a successor lease, the landowner is, accordingly, in a position to extract additional rent from the homeowner up to the value of the substantial costs that would be involved in such a move. Thus, absent government regulation, the landowner can extract a substantial premium unrelated to the level of the landowner's investments or costs on top of the rent premium due to scarcity that could be obtained in any event. *See* pp. 5-6, *supra*. Indeed, it is *the homeowner's* investments and potential costs that determine the amount of the premium. The more substantial the homeowner's site-specific investments and additional costs of moving, the greater the home-

owner's exposure to the landowner's ability to extract a rent premium. This additional premium constitutes what is often called a "quasi-rent." [8]

3. Similarly, in the absence of the state and city regulations here, the landowner is in a position to exploit the homeowner's dependent status at the point the homeowner wishes to sell his home. If the homeowner is unable to sell the home as affixed to the landowner's property, but is forced to sell the home off the site, the homeowner would lose the value of all site-specific investments already made and would be required to make additional, otherwise unnecessary, investments:

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[8] The term "quasi-rent" or "appropriable quasi-rent" is often used by economists to refer to the amount of advantage that can be gained by a party acting "opportunistically" after another party makes specialized investments that are specific to the former party's assets. Because the value of the investments in other uses is much less than in the specialized use, the investor is effectively "locked into" the transaction to a significant degree, and the difference in the value of the investments (as between the specialized use and the next best use) may, therefore, be subject to possible appropriation by the other party.

For these reasons, the dominant party in a situation involving quasi-rents may gain a return far in excess of the fair return on his own investments; that party's return will be based instead on his appropriation of the returns that result from the sunk investments of the other party. *See generally*, Klein, Crawford & Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & Econ. 297, 298-302 (1978); Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & Econ. 233, 234, 240 & n.30 (1979); Muris, *Opportunistic Behavior and the Law of Contracts*, 65 Minn. L. Rev. 521, 521-26 (1981); Goetz & Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1100-1102 & n.25 (1981); Haddock, Macey & McChesney, *Property Rights in Assets and Resistance to Tender Offers*, 73 Va. L. Rev. 701, 712-13 (1987); *see also* Goldberg, *Regulation and Administered Contracts*, 7 Bell J. Econ. 426, 439-41 (1976); Hirsch & Hirsch, *supra*, at 419-20.

Professor Timothy J. Muris cites the situation of a home located on land owned by another as a particularly vivid illustration of the "quasi-rent" problem. *See* Muris, *supra*, at 527 (homeowners with homes located on the property of another risk "landlords . . . increasing the rent up to the cost of moving their homes elsewhere").

(a) The homeowner would lose the value of his investment in transporting the home to the site.

(b) He would lose the value of all adaptations of the home to the site and improvements to the site.

(c) He would have to bear the additional costs of detaching, and, depending on the timing and circumstances of the sale, of transporting the home from the site.

(d) And he would have to pay the costs of repairing any damage to the home from its detachment and transportation from the site.

Absent the enactments here, when the homeowner attempts to sell the mobilehome, the landowner can capture from the homeowner an amount just short of the sum of these losses and costs—the appropriable amount that constitutes the "quasi-rent" in these circumstances, *see* note 8, *supra*—in one or more of the following three ways:

First, the landowner—by refusing to accept all prospective homebuyers as leaseholders—can effectively force the homeowner to sell the home to the landowner at a price just above the amount that results from subtracting the costs and losses incident to an off-site sale from the on-site value of the home. At such a price, the homeowner would be better off selling to the landowner than selling the home off the site. The landowner could then turn around and sell the home to a new buyer at the on-site price and pocket the difference, which would constitute the appropriated "quasi-rent."

Second, the landowner could simply charge the homeowner a sales or transfer fee for any on-site sale. As long as the amount of the fee is less than the sum of the costs and losses listed above—the "quasi-rent"—the homeowner would be better off paying the fee and selling the home on-site than selling the home off-site.

Third, the landowner could agree to accept the prospective buyer, but only at a higher rental rate. The prospective buyer would only be willing to pay the higher rate

if there were a reduction in the sale price of the home sufficient to finance the rental premium. Again, as long as the decrease in the price of the home that is caused by the rent increase is less than the amount of the quasi-rent, the homeowner would be better off accepting the price reduction and selling on-site than selling the home off-site.

Thus, in each of these three ways, the landowner could extract a considerable quasi-rent from the homeowner at the point of sale. And, in each case, the value that the landowner can appropriate does not result from any additional investments by the landowner or any additional good or service that the landowner has provided. To the contrary, the amount extracted is a function of the value the homeowner stands to lose by taking an action that would benefit neither party—removing the home from the site. The more the homeowner has invested in improvements to the home and the site, the more the landowner can extract at the point of sale.

B. The Effects of the California Mobilehome Residency Law on Interests of the Landowner and the Homeowner

In 1978, the State enacted a regulatory scheme directly addressed to, *inter alia*, the potential for exploitation by the landowner of the mobilehome owner's dependent position.

At the outset, the statute clearly recites the state legislature's understanding of the homeowner's vulnerability to such exploitation:

> The Legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter. [Cal. Civil Code § 798.55(a).]

Based on these considerations, the statute limits the permissible grounds on which a landowner may terminate a mobilehome owner's tenancy, but does so in a manner which fully protects the landowner's legitimate interests in preserving the economic value of his investments and his ultimate control over the use to which his land will be put. Permissible grounds for terminating tenancies thus include: "[f]ailure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes"; "[c]onduct by the homeowner or resident . . . which constitutes a substantial annoyance"; "[f]ailure of the homeowner or resident to comply with a reasonable rule or regulation of the park"; "[n]onpayment of rent, utility charges, or reasonable incidental service charges"; "[c]ondemnation of the park"; and "[c]hange of use of the park or any portion thereof [by the park owner] . . . ." Cal. Civil Code § 798.56 (West Supp. 1991).

Based on the same considerations, the statute limits the landowner's ability to exploit the homeowner's dependent position at the time of the mobilehome's sale. In particular, the statute prohibits two of the three means (discussed at pp. 9-10, *supra*) by which the landowner may extract the appropriable quasi-rent at the time of sale.

First, the statute provides that the landowner "shall not charge a homeowner . . . or the agent of any such person a transfer or selling fee as a condition of a sale of his mobilehome within a park unless the [landowner] performs a service in the sale." Cal. Civil Code § 798.72 (West Supp. 1991).

Second, the statute limits the grounds on which the landowner can refuse to lease the site to a buyer of a home sold on the site by the homeowner. Cal. Civil Code § 798.73. But, once again, the statute does so in a manner that fully protects the landowner's legitimate economic interests in his investments. Thus, the statute permits the landowner, "in order to upgrade the quality of the park,"

to require removal of a mobilehome upon its sale to a third party where the home "is in rundown condition or in disrepair," or where it is older or smaller than certain specifications set forth in the statute. Cal. Civil Code § 798.73. And, the statute, while permitting the landowner to "require the right of prior approval of a purchaser of a mobilehome that will remain in the park," provides that:

> Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the [landowner] reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park. [Cal. Civil Code § 798.74(a) (West Supp. 1991).]

All of these statutory provisions directly further the same policy. By preventing the landowner from unreasonably evicting a homeowner or refusing to approve an appropriate purchase of a home sold in place, and by similarly preventing the landowner from charging an unearned fee upon the sale of a home that will remain on site, these provisions prevent the landowner from using his property to take advantage of the homeowners' vulnerability to the appropriation of *their* investments.

The state statute does not, however, address two remaining means by which a landowner can exploit the homeowner's vulnerable position. First, the statute does not restrict the landowner's ability *on an ongoing basis* to extract rental premiums based on the scarcity of mobilehome sites in a given area and on the appropriable quasi-rents that result from the homeowner's site-specific investments and the costs of removing the home from the site. *See* pp. 7-8, *supra*. Second, the statute does not restrict the landowner's ability to extract the appropriable quasi-rent *at the time of sale* of the home by means of a rent increase to the prospective purchaser. *See* pp. 8-10, *supra*. The statute contemplates that these rent control issues are to be subject to local regulatory judgments. *See* Cal. Civil Code §§ 798.17, 798.45 (West Supp. 1991).[9]

C. The Effects of the City of Escondido Mobilehome Rent Protection Ordinance On the Interests of the Landowner and the Homeowner

In 1988, Escondido adopted a rent control ordinance that addresses the two gaps just discussed in the state-regulatory scheme. The ordinance controls increases in rent, whether imposed on on-going homeowners or on purchasers of homes sold in place.

On the face of the ordinance, careful provision is made to ensure that landowners will be permitted rent increases that provide a fair and reasonable return on the landowners' investments. Thus, the municipal board that is responsible for passing on all rent increase applications is given the following directives:

> The Board shall approve such rent increases as it determines to be just, fair and reasonable. The Board shall consider the following factors, in addition to any other factors it considers relevant, in making such determination:
>
> (1) Changes in the Consumer Price Index for All Urban Consumers in the San Diego Metropolitan Area published by the Bureau of Labor Statistics.
>
> (2) The rent lawfully charged for comparable mobilehome spaces in the City of Escondido.
>
> (3) The length of time since the last hearing and final determination by the Board on a rent

[9] The statute does place certain limits on the authority of local governments to control mobilehome rents: *First*, park owners are exempt from local rent control laws if they and their tenants enter long-term leases containing certain statutorily prescribed provisions. Cal. Civil Code § 798.17. *Second*, in order to promote the development of new mobilehome parks, California mandates that local rent control ordinances exempt all new construction from rent regulation. Cal. Civil Code § 798.45. In the latter regard, California rent control ordinances conform to the pattern of rent control laws in this country. *See* Mandel, *Does Rent Control Hurt Tenants*, 54 Brooklyn L. Rev. 1267, 1268 (1989).

increase application or the last rent increase if no previous rent increase application has been made.

(4) The completion of any capital improvements or rehabilitation work related to the mobilehome space or spaces specified in the rent increase application, and the cost thereof, including such items of cost, including materials, labor, construction interest, permit fees, and other items as the Board deems appropriate.

(5) Changes in property taxes or other taxes related to the subject mobilehome park.

(6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located.

(7) Changes in the utility charges for the subject mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants.

(8) Changes in reasonable operating and maintenance expenses.

(9) The need for repairs caused by circumstances other than ordinary wear and tear.

(10) The amount and quality of services provided by the applicant to the affected tenant.

(11) Any existing written lease lawfully entered into between the applicant and the affected tenant. [J.A. 11-12.]

Given the multiplicity of factors that are to be taken into account, it is impossible, based solely on the words of the ordinance, to ascertain with any kind of accuracy the amounts of rent increases that may be permitted to landowners in the future. The factors listed in the ordinance allow the board to monitor and regulate the landowners' efforts to charge rent premiums based on the scarcity of sites or on the extraction of appropriable quasi-rents. But, on its face, the ordinance only "takes" from the landowner the ability to increase rents unilaterally.

Assuming *arguendo* that the ordinance does in fact work to prohibit *entirely* the extraction of such premiums

by the landowner, the homeowner would receive the following benefits: the homeowner would not have to pay rents on an ongoing basis that include premiums for scarcity or quasi-rents; and, at the point of sale of the home, the homeowner would not be subject to extraction of the appropriable quasi-rents by the landowner. Thus, the homeowner would be in a position to realize a return on the full value of all the investments he has made in connection with his home: *viz.*, his investments in the home itself and improvements to the home, in transporting the home and attaching and adapting it to the site, and in improving the site.

These benefits go not only to persons who were homeowners at the time of the ordinance's enactment, but to all successor homeowners. As long as the state and city regulations remain in force, each successor homeowner will be free from rent premiums based on scarcity or the extraction of quasi-rents, and each successive homeowner will be able to invest in his home and his site without fear of being subject to the extraction of quasi-rents if and when he decides to sell his home.

To be sure, petitioners contend that while all successor homeowners may in fact receive such benefits, only the initial homeowners—*viz.*, those who owned mobilehomes at the time the ordinance was enacted—can properly be considered beneficiaries of the ordinance. Petitioners argue that *the full value* of all future benefits of the ordinance will be reflected in the prices paid to the initial homeowners by the first generation of subsequent purchasers, and will continue to be reflected in the purchase prices paid by all successive purchasers. On the basis of this theory, petitioners urge that no successor homeowners derive *any net benefits* from the ordinance. Pet. Br. at 23, 26-27. This theory simply cannot survive analysis.

First, the notion that the initial homeowner would, upon sale of his home, realize the present value of all future benefits of the ordinance—such that all future homeowners would gain no meaningful advantages from the ordinance—rests upon assumptions that have no

grounding in reality. Neither the initial homeowner nor the purchaser of the home would have any realistic ability to calculate the monetary value of the benefits of the ordinance with any degree of accuracy. No one knows what rent increases will be permitted by the board in the short term, much less the long term; no one knows what rent increases would have occurred in the absence of the ordinance; and, certainly, no one is in a position to compute the difference between these two unknown and unknowable amounts.

These uncertainties make it wholly unrealistic to assume that the initial homeowner somehow can deny subsequent purchasers all benefits of the regulations here at issue by charging a premium in the price of the home that will capture the full value of all benefits—just as it would be unrealistic to assume that, in the sale of a private home in the metropolitan Washington, D.C. area, a homeowner can deny all future homeowners any benefit of future increases in that home's value by charging a price that may contain within it some element of expected future appreciation. Benefits that are this speculative and contingent in nature are not susceptible to the kind of neat capture that petitioners hypothesize.[10]

Second, the notion that a subsequent purchaser gains no net benefits from a regulatory scheme because his enjoyment of those benefits may entail paying an increased purchase price is contrary to the most basic premises of our economic system. Presumably, those who make voluntary purchase decisions at market prices believe they are gaining benefits from their purchases. If, as a result of the ordinance, purchasers of a mobilehome are willing to pay more for the home, that is precisely because the purchasers perceive that the benefit they obtain in exchange for the increased price is worth the additional cost.

[10] As Professors Charles Goetz and Robert Scott noted in their study of long-term contracting, "where the future contingencies are peculiarly intricate or uncertain, practical difficulties arise that impede the contracting parties' efforts to allocate optimally all risks at the time of contracting." Goetz & Scott, *supra*, at 1090. *See also id.* at 1090 n.4. *See also* note 11, *infra*.

Here, it is likely that the benefits of the rent-control ordinance will make a mobilehome more attractive to a prospective purchaser, not because he knows that he will achieve a readily identifiable amount of savings, but because the ordinance (together with the state statute) provides him some insurance against certain forms of profteering or exploitation by the landowner. That "insurance benefit" will give the purchaser a measure of security in his investment in the home itself, as well as the knowledge that he can invest what he wishes in improving the home and its site—and, indeed, that he can invest in the broader community as well—free of the fear that such investments will subject him to the opportunistic behavior of a landowner who might treat the homeowner's investments as a means to extract greater profits.

The beneficial effects of the regulations in this regard are particularly significant in that this "insurance benefit"—*viz.*, the protection of homeowners from landowner opportunism and the resulting loss of investments—is not a product that the market produces without these regulations, despite its value to home purchasers. Thus, the regulations must be understood as creating a desired benefit to be used by purchasers as a class.[11]

[11] The failure of the private market to produce this "insurance benefit" is not surprising in light of the practical impediments to any contractual arrangement that would parallel the protections provided by the city and state regulations. The landowner would not rationally bargain away his power to exploit the homeowner's vulnerable position without obtaining the equivalent value in exchange. To make the transaction worthwhile from the homeowner's point of view, the protections would have to extend not only for the duration of his tenancy in the park, but also to at least certain terms of the lease for any purchaser of the home. But, as we have already shown at pp. 15-16 & n.10, *supra*, the uncertainties and contingencies inherent in such a transaction would make it impossible to obtain a reliable valuation of the exchange. In addition to other factors, there are variables within the knowledge and control of the homeowner—for example, the duration of the tenancy and level of future investment—that can significantly affect the value of the transaction from the landowner's perspective. These variables may also create a potential for adverse selection—*viz.* that those seeking contractual

Third, petitioners fail to recognize the broader public purposes that may be achieved by the regulations here.

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protections will be those to whom it will be most costly to grant those protections. Other variables are solely in the knowledge and control of the landowner. Such problems of asymetrical knowledge militate against a mutually agreeable valuation.

Moreover, the transaction would have to take account of a number of costs that the regulations remove from the calculus. For example, both the city and state regulations provide for public mechanisms of enforcement and administration, with built in economies of scale. The costs to an individual homeowner of obtaining comparable mechanisms would be prohibitive. And the price would also have to account for the transaction costs of reaching the agreement itself in the first instance, which in light of the problems already discussed would be considerable.

Scholars who have examined the ability of parties to protect themselves contractually from opportunistic appropriation of quasi-rents in long-term and complex relationships have found that effective contractual protection is rarely—if ever—obtained. *See, e.g.*, Goetz & Scott, *supra*, at 1090 n.4 ("when transactions are conducted under conditions of uncertainty and complexity, it becomes extremely costly —if not literally impossible—for parties . . . to describe the complete decision tree at the time of bargaining"); Klein, Crawford & Alchian, *supra*, at 303 ("[e]xplicit long-term contracts can, in principle, solve opportunistic problems, but . . . they are often very costly solutions"); Muris, *supra*, at 527-28 ("[f]ully explicit contracts . . . are not feasible when the cost of discovering and planning for all possible contingencies is prohibitive").

Moreover, even if complex contractual solutions to the problems of quasi-rents and opportunistic behavior were obtainable, many scholars view the efforts to obtain them as socially wasteful. Even if all issues of distributive justice were put aside, the fact remains that expenditures to capture quasi-rents generate no new product or service; nor do expenditures to gain contractual protection from the party who might capture quasi-rents. *See* Muris, *supra*, 524 ("Resources spent to implement or prevent opportunistic behavior do not help produce a commodity or service that the contracting parties mutually value. Accordingly, the elimination or reduction of these expenditures will improve the wealth of society by freeing the resources for productive use."). Thus, a number of commentators have argued that social welfare is often promoted by systems of regulation that prevent opportunism. *See id.* at 576-77 (noting benefits of various regulations which deter appropriation of quasi-rents); Williamson, *supra*, at 257-58 (same); *see also* Goldberg, *supra*, at 439-41.

The combined effect of the state and city enactments may well be to create an economic environment for mobilehome housing that encourages homeowners freely to invest in improving their homes, their lots, and their communities. By assuring homeowners that they will retain the value of their investments, the regulations give homeowners the incentive to make such investments, and generally to commit themselves to community improvements. Without these regulations homeowners might well refrain from such investments, or, alternatively, those placing a high value on such investments might well refrain from purchasing mobilehomes. Either way, mobilehome communities would be less stable and less attractive, and would thus make less of a contribution to the greater community's well being. The beneficiaries of these regulations thus clearly include all mobilehome residents, as well as the broader community, which has every interest in promoting socially productive investments by assuring that those who make such investments reap appropriate rewards.[13]

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[12] To the extent that an initial homeowner may obtain a unique benefit, it is important to be clear about what that benefit would be. Prior to the adoption of the regulations here, the ability of the landowner to extract quasi-rents at the time of sale would likely have resulted in a depression of the price of mobilehomes. In so far as that result occurred, it should follow that government restrictions on the landowner's ability to extract quasi-rents would tend to remove that depression in price. Accordingly, it may be that the initial howeowner was able to purchase the home at a depressed price and will be able to sell the home at a price that is not depressed.

But it may also be true that the class of initial homeowners has suffered a unique detriment. Of all present and future homeowners at the time the ordinance was enacted, by definition only the initial homeowners had leased sites under a regime where the landowners were free to extract rent premiums based on scarcity or quasi-rents. For the reasons stated in text, pp. 15-19, *supra*, all successor homeowners will have the protections that the ordinance provides against such premiums. If the initial homeowners receive an increase in the price of homes that somehow reflects the difference between leasing with the protections of the regulations as opposed to leasing without the protections of the regulations, that increase would be going to

II. THE ORDINANCE DOES NOT EFFECT A "TAKING" UNDER THE CONSTITUTION

As we have just demonstrated, all that the city rent control ordinance may be said to "take" from petitioners is the ability to obtain rent premiums in excess of a fair and reasonable rent. Indeed, the essence of petitioners' complaint is that the ordinance denies them the rent increases that would obtain in a market in which they could gain full advantage from scarcity and their market leverage. As we now demonstrate, this Court's decisions have repeatedly upheld as constitutional regulatory schemes that deny to property owners precisely such advantages.

It is well established that the Constitution does not protect the right of property owners to set prices or reap profits at the levels that could be achieved in some hypothetical market that is free of government regulation. To the contrary, we live in a society in which government is intimately involved in myriad aspects of our economic life, and thus where no market is entirely free of government regulation. Virtually all government regulation, in any form, has some direct or indirect effect on the value of private property or on the income to be derived from private property. Such government actions as the establishment of Federal Reserve Board policies, changes in trade policy, adoption of environmental or occupational safety and health restrictions, placement of roads and highway, or enforcement of the anti-trust laws all may have drastic effects on the value of any given parcel of private property.

Diminutions in the value of private property caused by government actions of this kind are simply part of the fluctuations in the value of property that occur in an economy in which market conditions are subject to myriad influences beyond the control of individual property owners. In a nation where "the function of

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the only class of howeowners that has had to pay the price of leasing without the regulations' protections.

government may often be to tamper with free markets, correcting their failures and aiding their victims," *Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986), no owner of property can be unaware that some regulatory action by government may affect the value of the owner's property. "Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939).

Thus, a seller or a landowner has no vested property interest in a level of profit based upon the price or the rent that would emerge in some hypothetical market free of regulation. The government has the constitutional authority, in pursuit of legitimate purposes, to reject the results produced by a "free market" and substitute a regulated result that balances the interests of the affected private parties in a different fashion. Whether the change in the value of property is caused by such government regulation of price or by the actions of private parties that affect the property's market value, one risk of property ownership in our society is, and always has been, that the property's value may change.

This Court has on a number of occasions applied these principles in the context of holding constitutional government price-control or rent-control regulations. Indeed, the Court has emphasized that such price and rent regulations have been with us for centuries:

> It is plain that the Constitution does not forbid the imposition, in appropriate circumstances, of maximum prices upon commercial and other activities. A legislative power to create price ceilings has, in "countries where the common law prevails," been "customary from time immemorial . . . ." *Munn v. Illinois*, 94 U.S. 113, 133. [*Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968).]

And, as Justice Jackson explained in his separate opinion in *Federal Power Comm'n v. Hope Gas Co.*, 320 U.S. 591 (1944), the power to legislate price ceilings is necessarily the power to deprive the seller of the value he

could obtain in a market in which he enjoyed advantages based on scarcity or market power:

> [T]here is nothing in the law which compels a commission to fix a price at that "value" which a company might give to its product by *taking advantage of scarcity, or monopoly of supply.* The very purpose of fixing maximum prices is to take away from the seller his opportunity to get all that otherwise the market would award him for his goods. This is a constitutional use of the power to fix maximum prices[.] [320 U.S. at 655 (emphasis added).]

This Court, in *Pennell v. San Jose*, 485 U.S. 1 (1988), recently made precisely the same point with specific application to residential rent control:

> [W]e have recognized that the government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly, or a discrepancy between supply and demand in the market for a certain product. Accordingly, appellants do not dispute that the [rent control] Ordinance's asserted purpose of "prevent[ing] excessive and unreasonable rent increases" caused by the "growing shortage of and increasing demand for housing in the City of San Jose . . ." is a legitimate exercise of appellees' police powers. *Cf. Block v. Hirsh*, 256 U.S. 135, 156 (1921) (approving rent control in Washington, D.C., on the basis of Congress' finding that housing in the city was "monopolized"). [485 U.S. at 11 (internal citations omitted).]

This Court has also stated the standard for determining when a price or rent control is so severe that the control constitutes an unconstitutional taking, and this standard is not geared to a property owner's ability to benefit from whatever scarcity or market power may have existed prior to the controls. In *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), for example, the FCC reduced the property owner's negotiated rental rates by 75%, and this Court ruled that even that drastic reduction did not constitute a taking:

> It is of course settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible. Such regulation of maximum rates or prices may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness. So long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition. * * * * Appellees have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory. Accordingly, we hold that the FCC regulatory order challenged below does not effect a taking of property under the Fifth Amendment. [*Id.* at 253, 254 (internal citations and quotation marks omitted).][13]

The ordinance here on its face provides for the approval of rent increases that are "just, fair and reasonable," and its terms focus specific attention on the landowner's costs and investments. J.A. 11, 12. There is simply no basis for a conclusion that the rate increases allowed by the ordinance are or will be "confiscatory."

While the foregoing authorities are, we submit, sufficient to dispose of the issue fairly raised by the ordinance challenged here, petitioners have sought to avoid the force of those authorities by recasting the issue in various ways. As we now show, each of the petitioners' efforts to recast the case fails at the threshold, because each is based on an inaccurate characterization of the ordinance or its effects.

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[13] This Court held many years ago that rental housing is within the category of "property devoted to public uses" as that phrase is used in the passage quoted in text. "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present." *Block v. Hirsh*, 256 U.S. 135, 156 (1921). That conclusion has been recently reaffirmed. *See Pennell, supra*, 485 U.S. at 12; *see also Reitman v. Mulkey*, 387 U.S. 369, 385-86 (1967) (Douglas, J., concurring).

1. Petitioners contend that the challenged ordinance "takes from [the] landowner the right of possession and confers that right upon another," thereby effecting a "permanent physical occupation" of the landowner's property. Pet. Br. at 9. By so characterizing the effect of the ordinance, petitioners seek to fit within the holding of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), in which the Court found a taking where a statute compelled a landlord to permit the cables and equipment of a cable company to occupy permanently a part of her apartment building.

The *Loretto* Court, however, was careful to circumscribe the scope of its holding. The Court emphasized that the case did *not* involve the respective rights of landlords and tenants, *id.* at 439, and stressed that governments retain broad discretion in reordering the landlord-tenant relationship:

> This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. [*Id.* at 440 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control)).]

The Court then concluded its opinion by declaring:

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property. [458 U.S. at 441 (emphasis in original).]

For each of the following reasons, petitioners' efforts to transform this case into a case governed by *Loretto* must fail.

First, as we stated at the outset of this brief, p. 2, *supra*, the complaint here challenges only the city ordinance, and not the state statute. The City is the only defendant, and no claim can be asserted against the City that the state statute is invalid. Yet petitioners' assertions that their rights of physical occupation have been taken go only to those provisions *of the state statute* relating to the landowner's right to evict tenants or to refuse to accept qualified prospective tenants. If petitioners were completely successful in this case, these *state restrictions* would remain in force.

The question here then is only whether the City's rent control provisions effect a "permanent physical occupation" of the landowner's property. Insofar as the ordinance applies to petitioners, it governs only the amount of allowable rents.[14] The ordinance then, for all purposes here, is simply a garden variety rent control regulation. As we have noted, *Loretto* explicitly states that such rent regulations are not physical takings, but rather are enactments that "states have broad power to [adopt] without paying compensation for all economic injuries that such regulation entails." 458 U.S. at 440.

Second, the state statute, even if it were properly before the Court, does not effect any physical taking. Petitioners are voluntarily in the business of running a mobilehome park. The very essence of that business is

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[14] Section 6 of the ordinance adopts provisions parallel to the state law provisions but is applicable only to "[a] tenancy which is not subject to the provisions of the Mobilehome Residency Law." J.A. 13. Petitioners do not contend that their challenges involve any such tenancies.

to invite mobilehome owners to place their homes on sites in the park. Indeed, no site in petitioner's park can become occupied except by petitioners' invitation. Petitioners' land is thus occupied by homes *not* because of state compulsion, but because of petitioners' commercial choices.

Moreover, the statute does not prevent petitioners from going out of the mobilehome park business, in whole or in part, and, thus, having the homes removed from petitioners' land. Subject only to notice requirements and local zoning requirements (neither of which are challenged), the statute expressly envisons that a landowner may "[c]hange [the] use of the park or any portion thereof . . . ." Cal. Civil Code § 798.56(g) (West Supp. 1991). What the state statute does regulate therefore is not whether the land will be occupied by mobilehomes, but whether the landowner will have the ability, while he chooses to remain in the mobilehome park business, to retain full control over the identity of his mobilehome lessees.[15]

All that petitioners here are faced with is a requirement that, while offering their property to the public for commercial advantage, they must do so without excluding tenants who give them no commercially valid reasons for such exclusion. In this respect, the state statute is wholly analogous to the regulation at issue in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), where this Court rejected, *inter alia*, a challenge under the Takings Clause to Title II of the Civil Rights Act of 1964, which banned racial discrimination by those offering

[15] For this reason, petitioners' citation of *FCC v. Florida Power Co.*, 480 U.S. 245 (1987), does not assist their cause. In *Florida Power Co.*, the Court held that the government may regulate the terms of the physical use of property once the landowner consents to that use. The Court reserved the question whether a physical taking would occur if the landowner were required to continue a use of his property to which he no longer consented. *See id.* at 251-52 n.6. No such question is presented here, because petitioners continue to voluntarily offer their property to the public for use as a mobilehome park.

public accommodations. The Court declared that "[the motel owner] has no 'right' to select its guests as it sees fit, free from governmental regulation." *Id.* at 259, 261. *See also, PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-84 (1980). The federal government, the States, and a multitude of local governments have adopted a variety of regulations of property owners who are in the business of offering their property for public occupation, severely limiting the ability of those owners to select who may accept their offers. *See, e.g.*, Fair Housing Act, 42 U.S.C. §§ 3601-3631, California Fair Employment and Housing Act, Cal. Gov't Code §§ 12900-12996, Cal. Unruh Civil Rights Act, Cal. Civ. Code § 51. And, the state regulations here are of the same character.

Regulations of this nature have roots as old as the common law's "common carriage" requirements and are integral to much of our established regime of regulated industries. *See, e.g., Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U.S. 498, 507-08 (1942) (order that a natural gas pipeline company "establish physical connections of their transportation facilities with [specific] distributors, and . . . sell gas to them"); *United States v. Terminal Railroad Ass'n*, 224 U.S. 383, 411-12 (1912) (order to owners of railroad terminal facilities to "provide definitely for the use of the terminal facilities by any other railroad . . . upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.") The California statute's restrictions on landowner discrimination is no more a taking than are the kinds of "common carriage" anti-discrimination rules enforced in *Illinois Natural Gas* or *Terminal Railroad Association*. Holding such rules to be takings would throw into question a vast portion of our regulatory regimes. *Loretto* gave no indication it intended such a result.

2. Petitioners next argue, apparently as an alternative to the physical taking argument, that the Escondido ordinance effects such "an oppressive deprivation of property rights" (Pet. Br. at 17) as to constitute a regulatory taking under the standards articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). In support of that argument, petitioners ascribe consequences to the ordinance that bear no relation to what the ordinance in fact requires—*e.g.*, that the ordinance's limitations on unilateral rent increases somehow "abridge" petitioners' "right to exclude others" from their property *id.* at 18), and that the ordinance somehow freezes the amounts that petitioners may charge as rent so that "[p]etitioners [will] receive controlled rents which decline in constant dollars of inflation" (*id.* at 20). When the effects of the ordinance are stated accurately, there can be no serious contention that the ordinance constitutes a regulatory taking under *Penn Central.*

As we have shown, the ordinance on its face simply establishes an administrative process through which park owners will receive rent increases that are "just, fair and reasonable" in light, *inter alia*, of the park owners' costs and investments. *See* pp. 13-14, *supra.* And, as we have also shown, this Court has repeatedly approved this form of regulation against constitutional challenge. *See* pp. 20-23, *supra. Penn Central* in no way altered the law in this regard. Indeed, *Penn Central* reiterated the vitality of numerous prior decisions in which "this Court has upheld . . . regulations that destroyed or adversely affected recognized real property interests." *Id.* at 125.

Although petitioners claim that the ordinance here "interferes with [their] reasonable investment-backed expectations" (Pet. Br. at 22), the ordinance's impact pales beside the economic injuries and diminished economic expectations this Court has found in other cases not to constitute regulatory takings.[16] The most that petitioners

[16] *See, e.g., Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 225 (1986) (retroactive imposition on employers of liability for substantial unfunded vested pension benefits is not a taking although "there is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability"); *Usery v. Turner Elkhorn Mining Corp.*, 428 U.S. 1 (1976) (retroactive imposition on employers of liability for compensation to employees for previously incurred disabilities is not a taking although employers had never contracted for such liability); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (reducing value of property from $800,000 to $60,000 is not a taking).

may lose is the opportunity to extract premiums—in excess of a fair and reasonable return—based on scarcity or on exploitation of quasi-rents. *See* pp. 6-19, *supra.* As we have shown, this Court's price and rent control cases reject the notion that the loss of the opportunity to exercise such forms of market leverage is a compensable loss under the Takings Clause. *See* pp. 20-23, *supra.*

3. Petitioners also contend that under *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987), the Escondido ordinance constitutes an unconstitutional taking, because the deprivation that park owners have suffered "does not substantially advance legitimate state interests." Pet. Br. at 25 (emphasis deleted). The predicate for this contention is the assertion that the ordinance has no effect other than to transfer from the landowner to those who were homeowners at the time the ordinance was adopted the right to collect the value of the rent premiums that are at issue here. *Id.* at 26-29. But we have demonstrated in great detail that the ordinance benefits not only the homeowner at the time the ordinance was adopted but all successor purchasers, as well as the greater community. *See* pp. 15-19, *supra.*

The fit between the means and the ends here could not be closer. The means are the control of the landowners' ability to charge rent premiums based on scarcity and the extraction of quasi-rents. The ends are the benefits that accrue directly from mobilehome owners being given a measure of protection against having to pay such premiums: (1) to limit periodic rent increases to amounts that provide a fair and reasonable return based on the in-

vestments of the park owner and not on the latter's market leverage; (2) to protect against the park owner's ability to extract quasi-rents from the homeowner at the time of sale by raising the rent to the purchaser and thereby depressing the sale price of the home; and (3) to give economic incentives to mobilehome owners to invest in improving their homes, their sites, and their communities. *See* pp. 6-19, *supra*.

Petitioners may disagree with the economic analysis or the policy choices that underlie the City's approach. But the language in *Nollan*, 483 U.S. at 834 n.3, that "the regulation [should] 'substantially advance' the 'legitimate state interest' sought to be achieved" (citation omitted) should not be understood as an invitation to judicial second-guessing of the wisdom of choices made by the democratic institutions of our society. Otherwise, the Takings Clause would become the vehicle for a revival of *Lochner v. New York*, 198 U.S. 45 (1905), and federal courts would again sit in judgment on the wisdom of all economic regulation.

What this Court said in *Nebbia v. New York*, 291 U.S. 502, 537-38 (1934), in the context of the Due Process Clause, is equally applicable in the context of the Takings Clause:

> With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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